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ENSURING THAT THE OPERATION OF JURY TRIALS IN GEORGIA ARE FULLY IN ACCORDANCE WITH EUROPEAN STANDARDS

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Contents

This Report is concerned with the arrangements made for the operation of jury trials in Georgia following the territorial and substantive extension of the possibility to use this trial format. It first looks briefly at the extent to which jury trials figure in the administration of justice in Council of Europe member States before examining the issues of compliance with the requirements of the European Convention on Human Rights that the European Court of Human Rights has found to arise from the use of jury trial. It then examines the legislative framework governing the use of jury trial in Georgia and identifies various changes that are necessary in respect of matters such as majority verdicts, the jury selection process, media coverage and ensuring the impartiality of a jury. The Report concludes with a review of the Jury Instructions developed for the purpose of guiding jurors as to the discharge of their responsibilities and draws attention to a number of ways in which these need to be elaborated so as to ensure that instructions actually given are sufficient to ensure that the accused and the public can understand the verdicts reached in particular trials.

1. Introduction

1. This Report is concerned with the arrangements made for the operation of jury trials in Georgia following the extension of the use of this trial format territorially and substantively through the amendments introduced into the Criminal Procedure Code of Georgia in 2016.

2. In particular, it addresses the compatibility with European standards – essentially the European Convention on Human Rights ("the European Convention") and the case law of the European Court of Human Rights ("the European Court") - of the legislative framework for jury trials and the guidance to be given to jurors as to the discharge of their responsibilities, as well as ways in which the achievement of this by both of them could be improved.

3. Consideration is given first to the extent to which jury trials are a feature of the administration of justice in Council of Europe member States and are thus, in principle, compatible with the right to a fair trial under Article 6(1) of the European Convention. The Report then reviews the case law of the European Court relating to the use of jury trials and the ways in which this can prove problematic. Thereafter, it examines the various provisions relating to jury trials that are in the Criminal Procedure Code of Georgia and the Criminal Code of Georgia, identifying a number of aspects that need attention in order to ensure the compatibility of jury trials with the requirements of the European Convention. The Report concludes with an analysis of the *Jury Instructions* that have been prepared as a model for judges conducting jury trials and makes a number of suggestions as to how these might be developed in order to assist jurors reach their verdicts in individual cases and to ensure that the basis for those verdicts can be understood both by the accused and the public.

4. This Report has been prepared at the request of the Council of Europe pursuant to the European Union – Council of Europe joint project "Application of the European Convention on Human Rights and harmonisation of national legislation and judicial practice in Georgia in line with European standards".

2. The Jury

5. The defining characteristic of what is traditionally understand to involve trial-by-jury is that the verdict in a criminal trial – guilty, not guilty and (in some jurisdictions) not proven – is determined by a panel of individuals specially constituted for this purpose and acting without the participation of the professional judge who otherwise presides over the proceedings.

6. There are currently nine Council of Europe member States that use this particular model of adjudication in criminal trials[1]. In addition, there are twenty-four others which use a collaborative court model of lay adjudicators sitting and deliberating alongside professional judges in criminal matters, collectively determining all questions of law and fact, in particular, the issue of guilt and the sentence[2]. A further fourteen member States have never had a jury system or any other form of lay adjudication in criminal matters or have abolished it so that their criminal courts are composed exclusively of professional judges[3].

7. As the European Court has observed, the manner in which the traditional jury functions in the member States operating this model varies:

> 48. In its traditional form, trial by jury involves a combination of a number of jurors sitting with one or more professional judges. The number of jurors varies according to the country and the subject matter of the proceedings. The number of professional judges varies from country to country. In Ireland, Malta, Russia, Spain, Switzerland and the United Kingdom the court and jury are presided over by a single judge. In Austria, Belgium and Norway the court consists of three professional judges together with the jury. The professional judges cannot take part in the jury's deliberations on the question of guilt, which falls within the exclusive competence of the jury.
> 49. In a number of countries the jurors are presented with a list of specific questions before they retire to deliberate on the facts of the case. Seven States – Austria, Belgium, Ireland, Norway, Russia, Spain and Switzerland – follow this practice.
> 50. In Ireland, England and Wales, at the conclusion of the evidence, the judge sums up the case to the jurors. He reminds them of the evidence they have heard. In doing so, the judge may give directions about the proper approach to take in respect of certain evidence. He also provides the jurors with information and explanations about the applicable legal rules. In that context, the judge clarifies the elements of the offence and sets out the chain of reasoning that should be followed in order to reach a verdict based on the jury's findings of fact.

[1] Austria, Belgium, Georgia, Ireland, Malta, Norway (only in serious appeal cases), the Russian Federation, Spain and the United Kingdom (England, Wales, Scotland and Northern Ireland).
[2] Bulgaria, Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Liechtenstein, Monaco, Montenegro, Norway (in most cases), Poland, Portugal, Serbia, Slovakia, Slovenia, Sweden, "the former Yugoslav Republic of Macedonia" and Ukraine.
[3] Albania, Andorra, Armenia, Azerbaijan, Bosnia and Herzegovina, Cyprus, Latvia, Lithuania, Luxembourg, Moldova, the Netherlands, Romania, San Marino and Turkey

51. In Norway the judge directs the jurors on each legal issue raised and explains the rules they should follow when they retire to deliberate on the verdict. At the end of the trial, he also sums up the evidence to the jury or draws its attention to evidence of importance.
52. In Austria the jurors' verdict is reached on the basis of a detailed questionnaire which sets out the main elements of the various charges and contains questions requiring a "yes" or "no" answer.
53. In principle, juries deliberate in private, without the presiding judge(s) being present. Indeed, the secrecy of the jury's deliberations is a firmly established principle in many countries.
54. In Belgium a professional judge may be invited to the deliberation room to provide the jury with clarifications on a specific question, without being able to express a view or to vote on the issue of guilt. In Norway the jury may summon the presiding judge, but if the jury considers that it needs further clarifications as to the questions to be answered, the legal principles applicable or the procedure to be followed, or that the questions should be amended or new questions put, it must return to the courtroom, so that the matter can be raised in the presence of the parties.
55. In the Canton of Geneva the presiding judge attends the jury's deliberations to provide assistance, but cannot give an opinion on the issue of guilt. A registrar is also present to make a record of the decisions taken and the reasons given.
56. The general rule appears to be that reasons are not given for verdicts reached by a traditional jury. This is the case for all the countries concerned, except Spain and Switzerland (Canton of Geneva).
57. In Spain the jury's verdict is made up of five distinct parts. The first lists the facts held to be established, the second lists the facts held to be not established, the third contains the jury's declaration as to whether the accused is guilty or not guilty, and the fourth provides a succinct statement of reasons for the verdict, indicating the evidence on which it is based and the reasons why particular facts have been held to be established or not. A fifth part contains a record of all the events that took place during the discussions, avoiding any identification that might infringe the secrecy of the deliberations.
58. Until 1991 the authorities of the Canton of Geneva considered that the jury satisfied the requirement of a reasoned decision by answering "yes" or "no" to the precise questions put to it. However, in a decision of 17 December 1991 the Federal Court found such replies to be insufficient and required juries in the canton to give reasons for their verdicts in future. In 1992 Articles 298 and 308 of the Geneva Code of Criminal Procedure were amended to require the jury to state reasons for its choices should it consider that this was necessary for an understanding of its verdict or its decision. Article 327 of the Code of Criminal Procedure requires the jury to state "the reasons for taking into account or disregarding the main items of evidence and the legal reasons for the jury's verdict and the decision by the court and the jury as to the sentence or the imposition of any measure".
59. Within the States that have opted for a traditional jury system, an appeal against the jury's verdict is available in Georgia, Ireland, Malta, Spain, Sweden and the United Kingdom, whereas no appeal is available in Austria, Belgium, Norway, Russia and Switzerland (Canton of Geneva). In Austria, convicted persons may appeal to the Court of Appeal against the sentence only; they may also file a plea of nullity with the Supreme Court.
60. In Belgium, since the events in issue in the present case, the Law of 21 December 2009, which came into force on 21 January 2010 (see paragraph 36 above), has amended the procedure in the Assize Court, notably by requiring it to state the main reasons for the verdict reached by the jury, in order to clarify its meaning[4].

8. There is no reference to the use of traditional juries – or indeed to any lay involvement in adjudication - in Article 6 or in any other provision of the European Convention. Nonetheless, it is now well-established in the case law of the European Court that the adjudication of a trial need not only be by professional judges[5] and so

[4] *Taxquet v. Belgium* [GC], no. 926/05, 16 November 2010. Switzerland (Canton of Geneva) is referred to in this judgment as having a traditional jury but it ceased to do so from 1 January 2011.
[5] See, e.g., *X v. Austria* (dec.), no. 4622/70, 22 March 1972, *Zarouali v. Belgium* (dec.), no. 20664/92, 29 June 1994 (in both of which a complaint that the applicants had been tried by a jury composed of laymen without legal experience was considered to be manifestly ill-founded) and *Taxquet v. Belgium* [GC], no. 926/05, 16 November 2010 (" the institution of the lay jury cannot be called into question in this context. The Contracting States enjoy considerable freedom in the choice of the means calculated to ensure that their judicial systems are

the use of a jury for this purpose can, in principle, be compatible with the requirements of a fair trial under Article 6.

9. Thus, the European Court has emphasised that

> 83. The Court notes that several Council of Europe member States have a lay jury system, guided by the legitimate desire to involve citizens in the administration of justice, particularly in relation to the most serious offences. The jury exists in a variety of forms in different States, reflecting each State's history, tradition and legal culture; variations may concern the number of jurors, the qualifications they require, the way in which they are appointed and whether or not any forms of appeal lie against their decisions (see paragraphs 43-60 above). This is just one example among others of the variety of legal systems existing in Europe, and it is not the Court's task to standardise them. A State's choice of a particular criminal-justice system is in principle outside the scope of the supervision carried out by the Court at European level, provided that the system chosen does not contravene the principles set forth in the Convention (see Achour v. France [GC], no. 67335/01, § 51, ECHR 2006-IV). Furthermore, in cases arising from individual petitions the Court's task is not to review the relevant legislation in the abstract. Instead, it must confine itself, as far as possible, to examining the issues raised by the case before it (see, among many other authorities, N.C. v. Italy [GC], no. 24952/94, § 56, ECHR 2002-X).
> 84. Accordingly, the institution of the lay jury cannot be called into question in this context. The Contracting States enjoy considerable freedom in the choice of the means calculated to ensure that their judicial systems are in compliance with the requirements of Article 6. The Court's task is to consider whether the method adopted to that end has led in a given case to results which are compatible with the Convention, while also taking into account the specific circumstances, the nature and the complexity of the case. In short, it must ascertain whether the proceedings as a whole were fair (see Edwards v. the United Kingdom, 16 December 1992, § 34, Series A no. 247-B, and Stanford v. the United Kingdom, 23 February 1994, § 24, Series A no. 282-A)[6].

3. Juries and the European Convention

10. A number of issues have arisen so far as to the operation of juries in a manner compatible with the requirements of the European Convention.

11. These concern the very right to jury trial, the requirement to perform jury service, compliance with the rules for appointment, the requirements and procedure governing the selection of jury members, addressing problems regarding the possible lack of impartiality of jury members that emerge in the course of a trial, protecting jury members from improper influences, the conduct of the proceedings and establishing the reasons for the verdict.

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in compliance with the requirements of Article 6. The Court's task is to consider whether the method adopted to that end has led in a given case to results which are compatible with the Convention, while also taking into account the specific circumstances, the nature and the complexity of the case. In short, it must ascertain whether the proceedings as a whole were fair"; para. 84).

[6] *Ibid.* See also the stipulation in paragraph 9 of Opinion No.11 (2008) of the Consultative Council of European Judges (CCJE) that ""Judicial decision" is used in this Opinion to mean a determination which decides a particular case or issue and is given by an independent and impartial tribunal within the scope of Article 6 of the ECHR including: … decisions given by professional or non-professional judges or by courts combining the two (*échevinage*)".

A. The right to jury trial

12. In the first place, all attempts so far to claim that there is a right to be tried by a jury have been rejected by the European Court and the former European Commission of Human Rights. This is because trial by jury is not seen as an essential aspect of a fair hearing in the determination of a criminal charge within the meaning of Article 6(1)[7], even though it is recognised that it may be an important element in ensuring fairness in the system of criminal justice, such as through obviating the risk of bias where a professional judge both determines guilt or innocence and the admissibility of evidence potentially relevant to that issue.

13. However, a different view might be taken where there is a failure to comply with such a right that has been established under national law since then there could be a failure to comply with the requirement in Article 6(1) that the tribunal be "established by law"[8].

B. The requirement to perform jury service

14. The European Court has underlined that a requirement to perform jury service should normally be regarded as corresponding to the notion of a "normal civic obligation", which Article 4(3)(d) of the European Convention deems not to constitute forced labour and so fall under the prohibition on it in Article 4(2).

15. However, a difference in treatment between groups of persons as to their obligation to perform jury service will be in violation of the prohibition on discrimination in Article 14 when taken in conjunction with Article 4(3)(d) where there has no objective and reasonable justification[9].

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[7] See *X and Y v. Ireland* (dec.), no. 8299/78, 10 October 1980, *Callaghan and Others v. United Kingdom* (dec.), no. 14739/89, 9 May 1989, *McLoughlin v. Ireland* (dec.), no. 15967/90, 6 July 1992, *Malone v. United Kingdom* (dec.), no. 25290/94, 28 February 1996, *McMullen v. Ireland* (dec.), no. 25353/94, 28 February 1996, *Wanyonyi v. United Kingdom* (dec.), no. 32713/96, 20 May 1998, *A J D v. United Kingdom* (dec.), no. 46290/99, 23 November 1999, *Klimenteyev v. Russia* (dec.), no. 46503/99, 17 September 2002, *Moiseyev v. Russia* (dec.), no. 62935/00, 9 December 2004, *Kositsyn v. Russia* (dec.), no. 69535/01, 19 October 2006, *Rozhkov v. Russia* (dec.), no. 64140/00, 5 February 2007, *Andrey Isayev v. Russia*, no. 24490/03, 23 September 2010 and *Twomey, Cameron and Guthrie v. United Kingdom* (dec.), no. 67318/09, 28 May 2013.

[8] It was significant in the cases of *Klimenteyev v. Russia* (dec.), no. 46503/99, 17 September 2002, *Moiseyev v. Russia* (dec.), no. 62935/00, 9 December 2004 and *Andrey Isayev v. Russia*, no. 24490/03, 23 September 2010 that the relevant legislation had not entered into force at the time of the proceedings concerned. In the case of *Twomey, Cameron and Guthrie v. United Kingdom* (dec.), no. 67318/09, 28 May 2013 the prejudice resulting from the non-disclosure to the defence of material on which the decision was made to proceed without a jury where one had been discharged following efforts to "tamper with" (i.e., influence) was considered to be negligible and justified by the public interest at stake. In this regard it was relevant that the trial judge did not see the non-disclosed material.

[9] See *Zarb Adami v. Malta*, no. 17209/02, 20 June 2006, in which various factors cited by the Government were not considered sufficient to explain the significant discrepancy in the distribution of jury service between men and women, namely, statistical information showed that during the five years preceding the relevant events only 3.05% of jurors had been women whereas 96.95% had been men. Although the law did not make any distinction

C. Compliance with appointment rules

16. Thirdly, a failure to comply with applicable national rules regarding appointment will almost certainly lead to a finding that the requirement that the tribunal be "established by law" has been violated as can be seen in cases concerned with the comparable arrangements for the appointment of lay judges[10].

17. However, the making of certain more procedural mistakes may not be regarded as problematic in this regard where these cannot be shown to have adversely affected the proceedings against the accused person concerned[11].

D. The selection of jury members

18. The requirements generally expected to be observed in order to safeguard judicial independence – in particular, as regards the manner of their appointment, pressure against outside influence, the appearance of independence and protection from removal during their period of appointment – will need to be observed in the case of jurors as much as professional judges[12].

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between the sexes as to eligibility for jury service, the discrimination resulted from a well-established practice, characterised by a number of factors, such as the manner in which the lists of jurors were compiled and the criteria for exemption from jury service.

[10] See *Posokhov v. Russia*, no. 63486/00, 4 March 2003 and *Fedotova v. Russia*, no. 73225/01, 13 April 2006, *Pandjikidze and Others v. Greece*, no. 30323/02, 27 October 2009 in which it was found that there were no legal grounds for the participation of the lay judges in the administration of justice as the requirements of the legislation regarding the drawing of random lot, two weeks' service per year" and (in *Fedotova)* no approved lists of lay judges had not been observed; *cf Yefimenko v. Russia*, no. 152/04, 12 February 2013, in which the requirements were considered to have been fulfilled. See also *Pandjikidze and Others v. Greece*, no. 30323/02, 27 October 2009, in which the European Court held that as the former legislation had, at the time of the events under dispute, been abrogated and had not been replaced by any other text. Although successive laws adopted between 1997 and 2005 had extended the terms of office of lay judges, there was no text that contained provisions concerning, among other things, the selection of candidates, their appointment and their rights and obligations, which ought to have been provided for by law in order for a court to be considered as having been "established by law".

[11] See, e.g., *Pesti and Frodl v. Austria* (dec.), no. 27618/95, 18 January 2000 (the failure of the Presiding Judge to swear in certain members of the jury by handshake) and *Pichugin v. Russia*, no. 38623/03, 23 October 2012 and *Danilov v. Russia* (dec.), no. 88/05, 14 April 2015 (the list of jurors had not been published in its entirety as required by law but its validity was not conditional on its prior publication and neither the applicant nor his counsel had ever attempted to obtain a copy from the Moscow Government, which was responsible for compiling and approving the list. Furthermore, there was a right to put questions to the candidate jurors with a view to identifying any reasons that might disqualify them from examining his case, and to file reasoned and unreasoned objections to the candidates or to the entire jury).

[12] Although, it is not an issue that has arisen specifically with regard to jury members, the importance of satisfying the requirements of independence was emphasised by the European Court as regards members of the armed forces serving on a court-martial in *Cooper v. United Kingdom* [GC], no. 48843/99, 16 December 2003. See also the finding in *Moiseyev v. Russia*, no. 62936/00, 9 October 2008 of a violation of Article 6(1) on account of the lack of the trial court's independence and impartiality where "there were eleven replacements of the judges on the bench. Four presiding judges dealt successively with the case. Each replacement of the presiding judge was followed by the replacement of both lay judges. In addition, on one occasion the substitute lay judge was called upon to step into the proceedings, and on another a new lay judge had to be designated to replace one who had withdrawn from the case. The proceedings had to be started anew each time a new member joined the formation" (para. 179).

19. Due account can, of course, be taken of the different position of jurors to professional judges, notably as regards financial remuneration and the length of an appointment. Thus, there would be nothing wrong in jury members being appointed just for a particular case.

20. The possible safeguards for independence will include rules on the eligibility for selection[13], which may include minimum and maximum age requirements and the exclusion of those with certain criminal records. There will thus be a need also for a means to establish whether or not someone is disqualified from serving on a jury[14]. However, Article 6(1) does not require that the parties participate in the selection of a jury[15], even though there is often provision made for that in the relevant legislation[16].

21. They will also include the use of some form of random selection procedure, the importance of which has been emphasised by the European Court and the former European Commission on many occasions[17]. Such a procedure will not, however, preclude the exercise of some discretion as regards the acceptance or refusal of excuses by persons included in the jurors' lists[18].

22. A further safeguard for independence is considered to be the provision to jury members of suitable guidance as to their role and the requirements involved in it[19].

23. In addition, the taking of an oath by jury members will be considered to help secure their independence[20].

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[13] This was, e.g., referred to in *Cooper v. United Kingdom* [GC], no. 48843/99, 16 December 2003, at para. 106.
[14] See, e.g., *Holm v. Sweden*, no. 14191/88, 25 November 1993, at para. 31, *Kremzow v. Austria* (dec.), no. 12350/86, 5 September 1990, at para. 1, *Zarouali v. Belgium* (dec.), no. 20664/92, 29 June 1994 and *Pichugin v. Russia*, no. 38623/03, 23 October 2012, at para. 180.
[15] *Kremzow v. Austria* (dec.), no. 12350/86, 5 September 1990, at para. 1 and *Pichugin v. Russia*, no. 38623/03, 23 October 2012, at para. 180.
[16] See, e.g., *Zarouali v. Belgium* (dec.), no. 20664/92, 29 June 1994 and *Pichugin v. Russia*, no. 38623/03, 23 October 2012, at para. 180.
[17] See, e.g., *Kremzow v. Austria* (dec.), no. 12350/86, 5 September 1990, *Holm v. Sweden*, no. 14191/88, 25 November 1993, at para. 31, *Zarouali v. Belgium* (dec.), no. 20664/92, 29 June 1994 and *Pullar v. United Kingdom*, no. 22399/93, 10 June 1996, at para. 40.
[18] "In a system primarily based on a chance selection of the jurors the exercise of such discretionary powers is not arbitrary even assuming that, in the case of Mrs. B., a different decision might have been more appropriate. The Commission notes that this juror was able to exercise her functions normally after her nervous breakdown at one stage of the proceedings. In any event substitute jurors were present, according to the law, who could have been called in if one of the main jurors had not been able to exercise his functions"; *Kremzow v. Austria* (dec.), no. 12350/86, 5 September 1990, at para. 1.
[19] "… the provisions of the briefing notes fully instructed ordinary members of the need to function independently of outside or inappropriate influence or instruction, and of the importance of this being seen to be done, providing practical and precise indications of how this could be achieved or undermined in a particular situation. The Court considers that those instructions served not only to bring home to the members the vital importance of independence but also to provide a significant impediment to any inappropriate pressure being brought to bear"; *Cooper v. United Kingdom* [GC], no. 48843/99, 16 December 2003, at para. 124.
[20] See, e.g., *Holm v. Sweden*, no. 14191/88, 25 November 1993, at para. 31 and *Cooper v. United Kingdom* [GC], no. 48843/99, 16 December 2003, at para. 106.

24. The need to observe the requirement of impartiality is equally applicable where a jury is the adjudicator.

25. The impartiality of jury members can be affected by their actual or possible familiarity or family relationship with one of the parties or a witness[21], their affiliation or employment[22], some prior involvement in the proceedings[23], the attitudes of a jury member to the race or other characteristics of a defendant[24] and a preconceived view regarding the defendant[25]

26. However, the fact that some familiarity or other such factor exists does not necessarily mean that there must be considered to be a lack of impartiality on the part of the tribunal for the purpose of Article 6(1) of the European Convention. In each case it will be a question of assessing whether or not the exact nature and degree of the factor is such that possible misgivings about the impartiality of the tribunal can be regarded as being objectively justified, particularly when other safeguards are taken into account.

27. Thus, the juror concerned may in fact have had only a very limited familiarity or tenuous relationship with a witness[26] or the accused[27] or other interested person[28] so

[21] See, e.g., *X v. Norway* (dec.), no. 3444/67, 16 July 1970 (the godchild of a person allegedly with an interest in the accused being convicted), *Pullar v. United Kingdom*, no. 22399/93, 10 June 1996 and *Mennie v. United Kingdom* (dec.), no. 24399/94, 16 October 1996 (a former employee of a prosecution witness), *Simsek v. United Kingdom* (dec.), no. 43471/98, 9 July 2002 (the sister-in-law of a prisoner officer in the prison to which the accused had been remanded prior to and during the trial), *Procedo Capital Corporation v. Norway*, no. 3338/05, 24 September 2009 (the partner in a firm that had provided consultancy services to one of the parties (in civil proceedings)), *Hanif and Khan v. United Kingdom*, no. 52999/08, 20 December 2011 (personal acquaintance with a prosecution witness) and *Kristiansen v. Norway*, no. 1176/10, 17 December 2015 (contacts with the victim when she was a child in connection with birthday celebrations at her home on account of her foster child being a pupil in the same school class).

[22] See, e.g., *Holm v. Sweden*, no. 14191/88, 25 November 1993 and *M B and T M S AB v. Sweden* (dec.), no. 21831/93, 22 February 1995 (membership of a political party), *Hanif and Khan v. United Kingdom*, no. 52999/08, 20 December 2011 and *Peter Armstrong v. United Kingdom*, no. 65282/09, 9 December 2014 (being a police officer but this issue was only addressed in the circumstances of those cases and not as a matter of principle. Indeed in the latter case there was found to be no basis for anxiety regarding the impartiality of a police officer serving on the jury) and *Danilov v. Russia* (dec.), no. 88/05, 14 April 2015 (working or contacts with the security service).

[23] See, e.g., *Ekeberg and Others v. Norway*, no. 11106/04, 31 July 2007 (giving a witness statement to the police in connection with the case).

[24] See, e.g., *Remli v. France*, no. 16839/90, 23 April 1996, *Gregory v. United Kingdom*, no.22299/93, 25 February 1997 and *Sander v. United Kingdom*, no. 34129/96, 9 May 2000 (all of which concerned alleged racial prejudice against the accused).

[25] See, e.g., *Miah v. United Kingdom* (dec.), no. 37401/97, 1 July 1998 (an alleged instant assumption of guilt by many jurors that indicated certain underlying prejudice of some description).

[26] E.g., in *Pullar v. United Kingdom*, no. 22399/93, 10 June 1996 the European Court observed that "Mr Forsyth, a junior employee within Mr McLaren's firm, had not worked on the project which formed the background to the accusations against Mr Pullar and had been given notice of redundancy three days before the start of the trial (see paragraphs 8 and 15 above). On these facts, it is by no means clear that an objective observer would conclude that Mr Forsyth would have been more inclined to believe Mr McLaren rather than the witnesses for the defence" (para. 40). This view was reaffirmed in and *Mennie v. United Kingdom* (dec.), no. 24399/94, 16 October 1996.

[27] E.g., in *Simsek v. United Kingdom* (dec.), no. 43471/98, 9 July 2002 the European Court observed that "Officer S worked in a House Block in which the applicant was placed as a standard Category A remand

that the basis for apprehension regarding their lack of impartiality may not be regarded as sufficiently well-founded.

28. Efforts to ensure the impartiality of jury members can involve the taking of pre-emptive measures such as checks before appointment[29]. Such checks could include questioning by the judge or by the parties[30]. However, there is no right under Article 6(1) of the European Convention to have an inquiry made into the political, religious and moral beliefs of prospective jurors[31].

29. Some guarantee of impartiality might also be provided by the giving of advice to jury members before or at the time of their appointment[32] and the giving by them of an oath or affirmation as to the discharge of their responsibilities[33], both of which also contribute to securing their independence.

30. Furthermore, the fact that there are a considerable number of jurors in a case has been seen as a factor that can assure the overall impartiality of the jury where doubts have been raised about one of its members[34]. However, the European Court also recognises

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prisoner prior to and during his trial. While some prejudicial connections could in principle arise from events prior to a trial, the present applicant's misgivings about that period are based on a number of weak suppositions – that, prior to the trial and importantly prior to the relevant juror's appointment to the jury, Officer S had any specific and prejudicial knowledge of the applicant who was one of 180 prisoners on that House Block; and that he would have had a reason to mention that particular prisoner to his sister-in-law; and that she would have had a reason to retain any such information. Such suppositions are not, in the Court's view, strong enough to constitute an objective risk to the impartiality of the jury". See also the view in *Procedo Capital Corporation v. Norway*, no. 3338/05, 24 September 2009, at para. 62, that the reasons for doubting a juror's objective impartiality were legitimate but not particularly strong where he had no direct link with the defendant company in civil proceedings – he was a partner in a company providing consultancy services to it - and he had no direct interest in the outcome of the case between it and the applicant company.

[28] See, e.g., *X v. Norway* (dec.), no. 3444/67, 16 July 1970 (the personal relationship of a juror with her godfather - who allegedly had an interest in the accused being convicted - was so remote that the connection between them could not affect confidence in her impartiality).

[29] See, e.g., *Hanif and Khan v. United Kingdom*, no. 52999/08, 20 December 2011, at para. 143

[30] See, e.g., *Pichugin v. Russia*, no. 38623/03, 23 October 2012, at para. 180 and *Danilov v. Russia* (dec.), no. 88/05, 14 April 2015, at para. 109. See also *Abdulla Ali v. United Kingdom*, no. 30971/12, 30 June 2015, in which the European Court noted that "In the event, the retrial did not commence until 2 March 2009, almost six months after the prejudicial reporting had ceased (see paragraph 35 above). It is clear that during jury selection, the trial judge took care to underline the importance of impartiality and asked questions to elicit any information which might put the impartiality of any particular jury member in doubt (see paragraphs 36-38 above). The applicant does not suggest that the judge failed to discharge any particular jury member during this process"; para. 96.

[31] See *Zarouali v. Belgium* (dec.), no. 20664/92, 29 June 1994, in which a claim that without such an inquiry it would not be possible to exercise the right to challenge jurors with full knowledge of the facts was rejected as manifestly ill-founded.

[32] See, e.g., *Pullar v. United Kingdom*, no. 22399/93, 10 June 1996, at para. 40 and *Hanif and Khan v. United Kingdom*, no. 52999/08, 20 December 2011, at para. 143.

[33] See, e.g., *Holm v. Sweden*, no. 14191/88, 25 November 1993, at para. 31 and *Pullar v. United Kingdom*, no. 22399/93, 10 June 1996, at para. 40.

[34] "In addition, regard must be had to the fact that the tribunal offered a number of important safeguards. It is significant that Mr Forsyth was only one of fifteen jurors, all of whom were selected at random from amongst the local population; *Pullar v. United Kingdom*, no. 22399/93, 10 June 1996, at para. 40. This point was reiterated in *Simsek v. United Kingdom* (dec.), no. 43471/98, 9 July 2002.

that there can be variations in the actual numbers of jury members in the various forms of jury adopted by States[35].

31. It should be borne in mind that the requirements of impartiality under Article 6(1) continue to apply to the judges in jury trials even though they do not take part in the votes on the verdict[36].

32. In organising and conducting the selection procedure, it also needs to be borne in mind that delays resulting from difficulties that may arise in forming a competent jury are likely to be regarded as attributable to the State for the purpose of determining whether or not the length of the proceedings will be regarded as reasonable for the purpose of Article 6(1)[37].

E. Responding to issues of impartiality that emerge

33. It may be that the possibility that there is a lack of impartiality on the part of one or more members of the jury may only emerge after the trial gets under way, whether because of a failure of disclosure by the jury member concerned[38], the fact that such a member only subsequently became aware of the problem[39], it having just arisen from conduct involving one or more jury members in the course of the proceedings[40] or from alleged attempts to influence them[41].

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[35] *Taxquet v. Belgium* [GC], no. 926/05, 16 November 2010, at para. 83.

[36] As the former European Commission observed in *Kremzow v. Austria* (dec.), no. 12350/86, 5 September 1990, "they have an important role concerning the direction of the trial, including in particular the taking of evidence and the legal instruction of the jury - they can set aside the verdict and they also participate in the vote on the sentence. It is therefore required that they be fully impartial". See also the finding in *Sutyagin v. Russia*, no. 30024/02, 3 May 2011 of a violation of Article 6 § 1 on account of the lack of the trial court's independence and impartiality on account of the unexplained replacement of the judge assigned to the case.

[37] "On the other hand, the Court considers that certain delays were attributable to the domestic authorities. In addition to certain specific delays such as between August 2005 and March 2006 or between October 2006 and May 2007, the length of the proceedings was due to the re-examination of the case on several occasions on account of the defects in the composition of the jury panels. Although the Court is not in a position to analyse the juridical quality of the domestic courts' decisions, it considers that, since the remittal of cases for re-examination is frequently ordered as a result of errors committed by lower courts, the repetition of such orders within one set of proceedings may disclose a serious deficiency in the judicial system"; *Shenoyev v. Russia*, no. 2563/06, 10 June 2010, at para. 66. The verdicts in two trials in this case had been set aside one trial had been set aside because certain jurors were not eligible to sit, in the first because the next of kin of some jurors had criminal records and in the retrial because one of the jurors had a mental illness. See also *Polonskiy v. Russia*, no. 30033/05, 19 March 2009, in which the domestic authorities were considered responsible where "a delay of more than five months occurred between the applicant's committal for trial on 12 April 2004 and the commencement of the trial on 29 September 2004. Only five hearings were scheduled during that period and all of them were adjourned as the trial court was unable to form a jury that would satisfy both parties"; para. 168.

[38] E.g., as in *Procedo Capital Corporation v. Norway*, no. 3338/05, 24 September 2009.

[39] E.g., as in *Peter Armstrong v. United Kingdom*, no. 65282/09, 9 December 2014 (in which one juror disclosed that he was a retired police officer and another juror disclosed that he was a serving police officer. The latter had done so after recognising another police officer in the court room. There was no bar on police officers serving on juries) and in *Kristiansen v. Norway*, no. 1176/10, 17 December 2015 (in which a juror disclosed to the court's president her previous contacts with the alleged victim after the latter and the accused had both testified).

[40] As in, e.g., *Remli v. France*, no. 16839/90, 23 April 1996 (in which remarks made a juror had been overheard and reported to the judges in the case), *Hardiman v. United Kingdom* (dec.), no. 25935/94, 28 February 1996 (in

34. In such cases it will be necessary to establish whether or not the source of the problem was more apparent than real[42] or has then been satisfactorily remedied, such as by the unilateral removal of a potentially prejudicial factor[43], by the removal of the juror concerned before he or she could be regarded as having contaminated the proceedings[44], by other measures taken by the court[45]. However, the fact that some

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which a juror sent a note inviting the lawyer for the applicant's co-accused for a drink), *Gregory v. United Kingdom*, no.22299/93, 25 February 1997 and *Sander v. United Kingdom*, no. 34129/96, 9 May 2000 (in both of which one juror reported racist remarks made by other jurors), *Corcuff v. France*, no. 16290/04, 4 October 2007 (the presence of the principal public prosecutor in the proceedings against him at the information meeting for jurors the day before the trial began), *Szypusz v. United Kingdom*, no. 8400/07, 29 September 2010 (the police officer responsible for operating video equipment was permitted to remain alone with the jury for almost two hours while they viewed important video evidence in the case), *Farhi v. France*, no. 17070/05, 16 January 2007 (an alleged unlawful communication between certain members of the jury and the prosecutor during the adjournment when the court had withdrawn to deliberate, leaving the jury in the courtroom) and *Ahmed v. United Kingdom* (dec.), no. 57645/14, 6 September 2016 (in which it was alleged that a juror had passed confidential information on jury deliberations in a case involving an accused of Asian origin to far-right organisations).

[41] In *El-Abth v. Norway* (dec.), no. 22125/93, 12 October 1994 there was alleged to have been influence during a discontinuation of the proceedings but no actual evidence of that was adduced. The former European Commission was also not prepared to accept that a discontinuation of the proceedings, even for a considerable period could per se reasonably be taken to affect the jury's impartiality.

[42] Thus, in *Corcuff v. France*, no. 16290/04, 4 October 2007 the information meeting was essentially of a practical nature and had been held to inform jurors about the organisation of the proceedings. Furthermore, as the European Court observed, the president of the court had ensured the neutrality of the meeting, no directions had been given to the jurors by judges or prosecutors and, with the presence of both a member of the prosecution and a member of the Bar, a fair balance had been struck in terms of the information given to the jurors.

[43] Thus, in *Simsek v. United Kingdom* (dec.), no. 43471/98, 9 July 2002 the European Court stated that "In so far as the statement contained additional clarifying material (particularly concerning how he became aware of his sister-in-law's presence on the jury and how he asked his mother to inform his sister-in-law that they should continue not to have any contact during the trial) those explanations are perfectly plausible, completely consistent with the officer's actions on 5 July 1996 and are not of such a nature as to warrant further enquiry … given the precautionary steps spontaneously taken by Officer S and his superior in July 1996 and the consequent agreement with the Court clerk (outlined above) that Officer S would not thereafter work with the applicant, there was no reason why the Court of Appeal should look behind Officer S's confirmation in his statement of November 1997 that he had no further contact with the applicant in the prison. Indeed, the Court notes that the applicant does not submit that Officer S worked with him after 5 July 1996. In such circumstances, the Court does not consider that the Court of Appeal's conclusion, that it was unnecessary to carry out a further enquiry". Similarly,

[44] As in *Ekeberg and Others v. Norway*, no. 11106/04, 31 July 2007 (where there was considered to be no reason to assume that a juror who had given a witness statement to the police in connection with the case had imparted information to other jurors about her prior knowledge of the case or had in any way influenced the jury before she had been discharged, this having occurred three weeks before the determination of the charges against the accused; see paras. 46 and 47) and in *Procedo Capital Corporation v. Norway*, no. 3338/05, 24 September 2009 (where the juror had withdrawn at an early stage in the proceedings and before the determination of a key issue in them).

[45] This was the case in *Gregory v. United Kingdom*, no.22299/93, 25 February 1997 (a firmly worded redirection to the jury by the judge, after having had the benefit of submissions from both counsel, in which the jurors were instructed to put out of their minds "any thoughts or prejudice of one form or another" was considered sufficient to dispel any objectively held fears or misgivings about the impartiality of the jury. However, there was a strong dissent by Judge Foighel as to the adequacy of the redirection). It was also the case in *Peter Armstrong v. United Kingdom*, no. 65282/09, 9 December 2014 (the trial judge promptly invited submissions from counsel and appropriate investigations were made, a list of questions was put to the serving police officer juror in order to identify the nature and extent of his knowledge of the officer in the courtroom and the police officer witnesses in the case, the accused was fully involved in these proceedings and was informed of the proposed questions before they were put, defence counsel had no concern about a retired or

other safeguards exist in addition to the various actions just mentioned may also be considered important in such cases[46], while in some instances those safeguards might

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serving police officer being on the jury if the juror concerned had no knowledge of the case, the parties or the police officer involved in it, there was an opportunity for defence counsel to investigate the retired police officer's connections with the case and to clarify the exact nature of the information he required as to the juror's connection with the case and an officer in the courtroom, defence counsel was informed of the list of questions drawn up and did not seek to modify or add to them and, following this, defence counsel confirmed that he was "quite happy that the juror may continue to serve". Furthermore, there was no suggestion at any stage that the retired police officer was acquainted with any other person involved in the trial proceedings or in the courtroom, the serving police officer had recognised a man sitting in the courtroom but did not know why he was present and was wholly unaware of his involvement as the officer in the case, the serving police officer was shown a list of the police officer witnesses and confirmed that he knew none of them and the defence did not depend to any significant extent – if at all – upon a challenge to the evidence of the police officer witnesses in his case; the only question for the jury was whether the accused had acted in self-defence) and in *Ahmed v. United Kingdom* (dec.), no. 57645/14, 6 September 2016 (the European Court considered that there were sufficient guarantees to exclude any legitimate doubts as to the jury's impartiality where it had been alleged that a juror had passed confidential information on jury deliberations in a case involving an accused of Asian origin to far-right organisations resulting from (a) the questionnaires the jury had completed confirming they had no association with those organisations; (b) the careful and fair manner with which the trial judge conducted his enquiries; (c) the directions he gave throughout the trial regarding the jury's conduct (including warnings, given at the start of the trial and periodically thereafter to only discuss the case with each other and only in their jury room); (d) the content of the jury's notes and the sequence of their verdicts. These indicated that they were progressing through the counts in the order recommended by the judge; (e) the verdicts of not guilty which were unanimously returned on against certain of the defendants, before the jury had been given a majority direction; and (f) the jury's verdicts appearing rational and consistent with the evidence. However, this was found not to have been the case in *Holm v. Sweden*, no. 14191/88, 25 November 1993 (the appeal court's jurisdiction was limited by the jury's verdict), *Remli v. France*, no. 16839/90, 23 April 1996 (where the court refused an application by defence counsel to take formal note of a statement as to an alleged racist remark by a juror without even examining the evidence submitted to it and did not order that evidence should be taken to verify what had been reported that formal note should be taken of it if this was established. As a result the accused was unable either to have the juror in question replaced by one of the additional jurors or to rely on the fact in issue in support of his appeal on points of law and he could not challenge the juror as the jury had been finally empanelled), *Sander v. United Kingdom*, no. 34129/96, 9 May 2000 (in which it was considered that the judge should have reacted in a more robust manner than merely seeking vague assurances that the jurors could set aside their prejudices and try the case solely on the evidence. In the European Court's view, an admonition or direction by a judge, however clear, detailed and forceful, would not change racist views overnight. It was also significant that, unlike in the *Gregory* case, there was an admission by a juror that he had made racist comments and the accused's counsel had insisted throughout the proceedings that dismissing the jury was the only viable course of action. Judges Bratza, Costa and Furmann dissented from the finding of a violation of Article 6(1)), *Farhi v. France*, no. 17070/05, 16 January 2007 (although the president of the court had organised an adversarial hearing – involving counsel for the accused and the civil party, the accused and the prosecutor - in respect of an incident in which the prosecutor had been left alone with several jury members, the European Court considered that only a hearing of the jurors would have been likely to shed any light on the nature of the any remarks exchanged and the influence they might have had, if any, on their opinions) and *Kristiansen v. Norway*, no. 1176/10, 17 December 2015 (in which a juror had expressed a view to other jury members about the character of the alleged victim in the case and the court had neither discharged her as a juror nor redirected the jury by, e.g., impressing on its members the need to rely on evidence presented in court alone and not to allow any other factor to influence their decision).

[46] Thus, in *Ekeberg and Others v. Norway*, no. 11106/04, 31 July 2007 the European Court emphasised that the legislative rules governing the impartiality of judges also applied to jurors, the presiding judge at the opening of the trial had discussed with the jury the impartiality requirement applicable to jurors, the jury had been reminded of the importance of this requirement when the High Court promptly ordered the withdrawal of the juror who had made a statement to the police in connection with the case, neither side in the trial had relied on the juror's statement and the presiding judge had regularly remind the jury to rely only on statements presented in court and not to discuss the case with third parties. Furthermore, in *Ahmed v. United Kingdom* (dec.), no. 57645/14, 6 September 2016 the European Court considered that additional safeguards, providing further assurances of the jury's objective impartiality existed, namely, (a) the oath the jury took and standard directions they would have received to try the case only on the evidence before them, (b) the arrangements for the seclusion of the jury

– having regard to the nature of the particular problem - be seen in themselves as sufficient means of addressing it[47].

35. However, it may be that in some cases an issue affecting impartiality may only be satisfactorily addressed by the judge by discharging the entire jury and constituting a new one[48].

36. In some instances, an issue relating to a possible lack of impartiality may only emerge after the trial has concluded[49] and in such cases there will be a need for it to be addressed in appellate proceedings.

37. The focus of those proceedings will undoubtedly have to be limited to compliance with the requirement of objective impartiality where either the principle of the inviolability of jury deliberations would preclude any investigation into the existence of actual partiality on the part of individual jury members or no reasons were given

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while they deliberated and the broader arrangements made to ensure that they were insulated from the publicity and other interest surrounding the trial, (c) the ability of the trial judge quickly to respond to any suggestions of misconduct, both when the first tweets from the far right organisations stating that there had been a conviction before the jury had returned its verdict and the subsequent ones later that day, (d) the investigation after trial by the Criminal Cases Review Commission and its ability to draw on the resources of the police to assemble the evidence necessary to assist it and, in turn, to assist the appeal court, (e) the oversight exercised by the appeal court, including its power to direct the Commission to investigate, and the appeal court's power to order further investigation if it felt that was necessary in the light of the investigation already conducted and (f) the appeal court's power to quash the accused's conviction if it found there was any doubt as to the safety of that conviction.

[47] Thus, the European Court found in *Szypusz v. United Kingdom*, no. 8400/07, 29 September 2010 - a case in which a police officer had remained with jurors while they viewed important video evidence - that there were sufficient safeguards to exclude any objectively justified or legitimate doubts as to the impartiality of the jury on account of: the oath taken by jurors; the trial judge's clear direction to the jurors that the police officer's role was limited to operating the video machine and that there was to be no communication with him other than simply asking him to play the parts of the footage that the jury wished to see; the jury having been advised at the commencement of the trial that they should bring any concerns regarding fellow jurors to the attention of the trial judge as soon as such concerns emerged; there was no reasonable foundation for the suggestion that the police officer had inadvertently contributed to an imbalanced perception of the evidence by selecting particular extracts to show to the jury; and the defence counsel had been consulted and had consented to the course of action taken (paras. 84-90). Similarly, in *Hardiman v. United Kingdom* (dec.), no. 25935/94, 28 February 1996 - in which a juror had sent a note inviting the lawyer for the applicant's co-defendant for a drink - the European Court considered that it was sufficient that the trial judge had warned the jurors of the danger of relying on the evidence of one defendant if it incriminated the other, the note had been opened by the trial judge in the absence of the jury and with all counsel present and no counsel (including the applicant's own counsel) had requested the trial judge to take the matter further).

[48] The European Court has not specifically said that this was required in any cases but it is a necessary conclusion from its finding that insufficient steps were taken to address a problem (as may have been the case in *Sander* and *Kristiansen*) or that it was unlikely that any adequate ones were actually available (as seemed to be the case in *Farhi*).

[49] As, e.g., in *Pullar v. United Kingdom*, no. 22399/93, 10 June 1996, *Mennie v. United Kingdom* (dec.), no. 24399/94, 16 October 1996*Miah v. United Kingdom* (dec.), no. 37401/97, 1 July 1998, *Simsek v. United Kingdom* (dec.), no. 43471/98, 9 July 2002 and *Hanif and Khan v. United Kingdom*, no. 52999/08, 20 December 2011.

for the verdict concerned[50] but the adequacy of the review undertaken will have to be evident to preclude a successful challenge before the European Court[51].

F. Protecting the jury

38. The case law of the European Court indicates that protecting the jury from breaches of the secrecy of their deliberations and from being influenced by media coverage, other pressures and exposure to material not adduced as evidence will not necessarily be incompatible with rights guaranteed by the European Convention.

39. Thus, the European Court has emphasised that a rule governing the secrecy of jury deliberations served

> to reinforce the jury's role as the ultimate arbiter of fact and to guarantee open and frank deliberations among jurors on the evidence which they have heard[52].

40. Furthermore, both the former European Commission and the European Court have also considered that the unlimited prohibition on any publication of information about the deliberations of a jury resulting from such a rule is not an interference with freedom of expression that amounts to a violation of the right guaranteed by Article 10 of the European Convention[53]. This conclusion rests on the importance attached to the ability of jurors to express themselves freely in the jury room. As the European Court observed

> As to lay jurors, who are often obliged by law to undertake jury service as part of their civic duties, it is essential that they be free to air their views and opinions on all aspects of the case and the evidence before them, without censoring themselves for fear of their general views or specific comments being disclosed to, and criticised in, the press[54].

41. In addition, it is also recognised that, given the need to ensure that jurors are not prejudiced by media coverage of proceedings, it may be compatible with the right to

[50] As, e.g., in *Miah v. United Kingdom* (dec.), no. 37401/97, 1 July 1998 and *Pullar v. United Kingdom*, no. 22399/93, 10 June 1996.
[51] As it was considered to be the case in *Miah v. United Kingdom* (dec.), no. 37401/97 ("the analysis undertaken by the Court of Appeal, in assessing the strength of the allegations of alleged bias and therefore the merits of the applicant's appeal regarding the jury, was sufficient to dispel any objectively-held misgivings about the impartiality of the jury and provide the applicant with a fair hearing complying with the requirements of Article 6 para. 1"), 1 July 1998, as well as in *Hardiman v. United Kingdom* (dec.), no. 25935/94, 28 February 1996, *Pullar v. United Kingdom*, no. 22399/93, 10 June 1996, *Simsek v. United Kingdom* (dec.), no. 43471/98, 9 July 2002 but not in *Hanif and Khan v. United Kingdom*, no. 52999/08, 20 December 2011.
[52] *Gregory v. United Kingdom*, no. 22292/93, 25 February 1997, at para. 44. See also *Miah v. United Kingdom* (dec.), no. 37401/97, 1 July 1998.
[53] *Associated Newspapers Limited, Steven and Wolman v. United Kingdom* (dec.), no. 24770/94, 30 November 1994 and *Seckerson and Times Newspapers Ltd. V. United Kingdom* (dec.), no. 32844/10, 24 January 2012.
[54] *Seckerson and Times Newspapers Ltd. V. United Kingdom* (dec.), no. 32844/10, 24 January 2012, at para. 44.

freedom of expression to impose restrictions on what may be published during the course of the trial proceedings[55] and to impose sanctions where these are breached[56].

42. However, it should be noted that there has been no instance so far in which the European Court has actually found hostile media coverage to have caused jurors to be prejudiced in a particular case[57].

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[55] See, e.g., *Hodgson, Woolf Productions Ltd and National Union of Journalists v. United Kingdom* (dec.), no. 11553/85, 9 March 1987 (a ban on a television programme that would have broadcast studio readings from an edited transcript of the hearings in a highly publicised and controversial trial without any dramatic re-enactment of proceedings in the court-room or any attempt to reproduce the atmosphere of the trial. The judge was concerned that in a programme which lasted thirty minutes there would be an inevitable tendency to highlight the most dramatic parts of a five-hour hearing. Furthermore, he considered it important that members of the jury should decide the case on the evidence as it was heard from the witness box and not from actors on a television programme).

[56] See, e.g., *Tourancheau and July v. France*, no. 53886/00, 24 November 2005 (which concerned the fines imposed on a journalist and editor breach of the prohibition on publishing documents in the case file ahead of the proceedings in open court, with particular emphasis being placed on the possible impact of the article concerned on the members of a lay jury).

[57] See, e.g., *Middleton v. United Kingdom* (dec.), no. 23934/94, 12 April 1996 ("As to whether the applicant's fears of bias on the part of the jurors due to the newspaper coverage can be said to be objectively justifiable, the Commission recalls that, in the present case, the trial proceeded over three days and considers that the trial judge was well placed to evaluate the jurors by his interaction with them over that period. Having been made aware of the issue concerning newspaper reports, the trial judge commenced his directions to the jury by carefully emphasising the necessity to decide the case on the facts placed before them during the trial and not on the basis of any speculation or comment made elsewhere including those in newspapers. In addition, the newspaper articles submitted by the applicant were relatively short and the Commission considers that they simply recorded, without comment, the evidence that had been presented during the previous days of the trial by various witnesses including the applicant. In the circumstances, the Commission considers that the applicant's fears of bias on the part of the jurors are not objectively justifiable"), *Pullicino v. Malta* (dec.), no. 45441/99, 15 June 2000 ("the length of time taken by the jury to reach a verdict - seven and a half days - would strongly suggest that the jurors acted in accordance with their own conscience and the requirements of the oath which they had sworn. The applicant was in fact acquitted of the principal charge against him, wilful homicide"), *Noye v. United Kingdom* (dec.), no. 4491/02, 21 January 2003 (The judge ruled in this case that the concerns the applicant had about the effect of the adverse publicity on the jurors could be adequately dealt with by careful directions to the jury. He noted that the jury, following directions, could be trusted to approach the facts as they would be established, bearing in mind that most of the publicity had been some time in the past and the detail was likely to have been forgotten … Although the applicant submits that no direction by the trial judge would have been capable of remedying the situation, the Court considers that in the circumstances of this case the judge could properly assume that the jury would follow the directions he did give"), *Mustafa (Abu Hamza) v. United Kingdom* (dec.), no. 31411/07, 18 January 2011 ("40. . In the present case, the trial judge gave a full and unequivocal direction to the jury to ignore the adverse publicity the applicant had received and to concentrate instead on the evidence before them. A further direction was given after the jury had begun their deliberations. The Court of Appeal considered that direction to be "careful and skilful". The Court shares that view: the direction given to the jury, when taken with the repeated warnings given by the trial judge to the media in the course of the trial, provided sufficient guarantees to exclude any objectively justified or legitimate doubts as to the impartiality of the jury"), *Beggs v. United Kingdom* (dec.), no. 15499/10, 16 October 2012 ("128. As to the content of the jury directions in the case, the Court observes that the jury were warned at the outset of the trial that they were required to decide the case on the evidence presented in court only (see paragraph 49 above). It refers in particular to the trial judge's charge to the jury at the conclusion of the trial, the terms of which are reproduced above (see paragraph 36 above). In his directions, the judge warned the jury to disregard any extraneous material which had come to their attention and explicitly referred in this regard to material in the press and on television. There is nothing in the circumstances of the case to suggest that the jury could not be relied upon to follow the judge's instructions and it is therefore reasonable to assume that the jury would follow the directions given (see the Court's similar conclusion in Szypusz, cited above, § 85)) and *Abdulla Ali v. United Kingdom*, no. 30971/12, 30 June 2015 ("97. … Once the jury had been selected, the judge gave a lengthy direction in which he alluded to prior "inaccurate and unsatisfactory reporting" and emphasised that the jury had to decide the case on the evidence heard in court and nowhere else. He warned them not to speak about the case

43. Apart from the judge's direction to the jury regarding the media coverage and the other such safeguards in the trial process discussed above, particular indicia that the jury has not been affected by hostile media coverage will be the length of time the jury in the case have deliberated[58], the manner in which they have deliberated[59] and whether they have returned different verdicts on the charges faced by the applicant and, where relevant, his co-defendants[60].

44. There may, however, be a need to ensure that jury members are protected from pressure or influence being exercised by the defendant in the case[61].

45. Moreover, the European Court accepts that a member of a jury may be sanctioned for bringing introducing extraneous evidence into the jury room which may have a prejudicial effect[62].

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to family and friends, not to read newspaper report or watch television broadcasts about the case and not to carry out any research, including on the Internet (see paragraph 39 above). The applicant has not suggested that, at the commencement of the retrial, he objected to the direction proposed by the trial judge. Throughout the trial, the judge repeated his injunction to the jury not to discuss the case with family or friends and not to carry out research (see paragraphs 40-41 above). During his summing-up, the judge again reminded the jury that they should not discuss the case with anyone other than other jury members and, after the jury had retired to deliberate, he reminded them each evening that they should not discuss the case outside the jury room (see paragraph 42 above). 98. The Court is likewise satisfied that the reasons given by the judge in the retrial for refusing the application for a stay on proceedings and by the Court of Appeal for dismissing the appeal were both relevant and sufficient. When publication of the prejudicial material commenced, the decision to pursue a retrial had not yet been made. Any members of the public exposed to the reports would not have known at that time that they would be involved in the subsequent retrial. The trial judge considered whether sufficient time had elapsed to allow the reports to fade into the past, having carefully reviewed the content of each and every instance of reporting to which his attention had been drawn, and recognised the need for careful jury directions, which he subsequently delivered. There is nothing in the circumstances of the case to suggest that the jury could not be relied upon to follow the judge's instructions to try the case only on the evidence heard in court. The fact that the jury subsequently handed down differentiated verdicts in respect of the multiple defendants in the retrial proceedings, including three acquittals on Count 1 (see paragraph 43 above), supports the trial judge's conclusion that the jury could be trusted to be discerning and to ignore previous media reports and, consequently, decide the case fairly on the basis of the evidence led in court").

[58] As in *Pullicino v. Malta* (dec.), no. 45441/99, 15 June 2000 (seven and a half days).

[59] As in *Mustafa (Abu Hamza) v. United Kingdom* (dec.), no. 31411/07, 18 January 2011 ("all the indications were that the jury were working their way through the evidence before them"; para. 38).

[60] As in *Mustafa (Abu Hamza) v. United Kingdom* (dec.), no. 31411/07, 18 January 2011 ("it was not without significance that not guilty verdicts were returned on certain of the counts in the indictment and the jury's verdicts reflected a "rational differentiation" between the stronger and weaker counts. The jury's verdicts also show that, despite his submission to the contrary, even after the events of 11 September 2001 it was still possible for the applicant to explain his actions to the jury; had he not been able to do so, the jury would not have acquitted him of certain of the charges"; para. 38) and *Abdulla Ali v. United Kingdom*, no. 30971/12, 30 June 2015 (see fn. 57 above). The value of all three indicia was reaffirmed in *Ahmed v. United Kingdom* (dec.), no. 57645/14, 6 September 2016, at para. 62.

[61] E.g., attempts to bribe or otherwise influence jurors were background facts in *Welch v. United Kingdom* (dec.), no. 17440/90, 12 February 1993, *Ivens v. United Kingdom* (dec.), no. 40157/98, 3 April 2001 and *Mikhail Grishin v. Russia*, no. 14807/08, 24 July 2012.

[62] In the case of *Dallas v. United Kingdom*, no. 38395/12, 11 February 2016 was concerned with whether or not the basis for imposing criminal liability on a juror who had conducted internet research on the case she was trying, thereby obtaining extraneous information about the case, and who had imparted that extraneous information to other members of the jury whilst the jury were in deliberation satisfied the requirements of accessibility and foreseeability for the purposes of the prohibition on retrospective liability in Article 7 of the European Convention. However, the European Court considered that "it must be quite evident to any juror that

G. The conduct of proceedings

46. In order for a jury to be able to reach any conclusions on the merits of the case, it must be in a position to assess the credibility of witnesses[63]

47. Due account must also be taken of the possible prejudicial effect that remarks made by judges or lawyers in the course of the proceedings may have on jurors, which may be affected by restrictions on questions or submissions by counsel in the proceedings[64].
48. The fact that the security measures being applied to an accused when present in the courtroom will lead the jury to infer that he or she was considered by the police and

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deliberately introducing extraneous evidence into the jury room contrary to an order of the trial judge amounts to intending to commit an act that at the very least carries a real risk of being prejudicial to the administration of justice" (para. 74).

[63] "The Court observes that the presiding judge dismissed all questions concerning Mr K.'s criminal record, the reasons for not giving testimony inculpating the applicant during his first questionings in 1999 and his motivation for starting to give such evidence in 2003, as well as concerning possible pressure on him from the prosecuting authorities (see paragraphs 56, 63 and 64 above). It notes that it was the jury's task to determine what weight, if any, should be attached to Mr K.'s statement against the applicant. In order to perform that task they needed to be aware of all relevant circumstances affecting the statement's accuracy and credibility, including any incentive Mr K. might have had to misrepresent the facts. It was therefore important for the defence to discuss the above issues in the presence of the jury in order to test Mr K.'s reliability and credibility. The Court is concerned about the presiding judge's statement that counsel for the applicant "were not allowed to cast doubts on witness statements" (see paragraph 56 above) and that the jury "[did not] need not know [Mr K.'s] motivation for giving testimony [against the applicant]" (see paragraph 64 above)"; *Pichugin v. Russia*, no. 38623/03, 23 October 2012, at para. 210. As the accused was not allowed to question Mr K. about the factors that might undermine the credibility of his testimony, which was decisive evidence against him, the Court found that his defence rights were significantly restricted and that there had been a violation of Article 6(3)(d) of the European Convention.

[64] The possibility of this occurring can be seen in three cases where this risk was found not to have materialised, namely. *Reid v. United Kingdom* (dec.), no. 32350/96, 30 October 1997 (in which the judge - in her summing up to the jury in the prosecution of a person of Afro-Caribbean descent – had referred to the possibility of two of the policemen (not the accused) being the "niggers in the woodpile as a graphic way of explaining to the jury that it could not be said that the police officers who came from a particular district were alone in behaving as the accused had been alleging, but that the sergeant was also necessarily involved in his allegations. The judge had immediately recognised that the phrase was inappropriate and it was considered that the apology was sufficient to ensure that a jury hearing those words would not have been prejudiced against the case of the accused), *Elias v. United Kingdom* (dec.), no. 48905/99, 16 January 2001 (in which the prosecutor drew an analogy between the accused – who was of Jewish origin - and the character of Fagin in Charles Dickens' novel Oliver Twist without being aware of the significance of the remark. In a subsequent apology, the prosecutor underlined in the clearest possible terms that any analogies he had drawn did not form part of the case and it was concluded that there was no real danger that the jury or any of their number regarding the accused's case with disfavour on the grounds of racial prejudice or bias as a result of the prosecutor's words) and *C G v. United Kingdom*, no. 43373/98, 19 December 2011 (in which there had been significant interruptions by the judge with the examination of witnesses by the accused's lawyer. Although these interventions were considered excessive and unfair, the European Court did not consider that they rendered the trial unfair because the accused's lawyer had never been prevented from continuing with the line of defence that he was attempting to develop either in cross-examination or through his own witness, he had been able to address the jury in a final speech which lasted for 45 minutes without interruption, apart from a brief intervention which was found to be justified, and the substance of the accused's defence was reiterated in the trial judge's summing-up, albeit in a very abbreviated form).

the judge to be dangerous will not, of itself, lead to a violation of the presumption of innocence, contrary to Article 6(2) of the European Convention[65].

49. However, the European Court has also recognised that the means chosen for ensuring order and security in the courtroom can involve measures of restraint that entail a violation of the prohibition on ill-treatment in Article 3 on account of their level of severity or by their very nature and the fact that the proceedings involve a jury may be a material consideration when such an assessment has to be made[66].
50. In addition there is a need to ensure that the conduct of the proceedings does not result in a violation of the right under Article 6(1) of the European Convention to be tried

[65] See *Welch v. United Kingdom* (dec.), no. 17440/90, 12 February 1993 (in which the measures in question involved the surrounding of the courtroom by police in bulletproof vests and armed with shotguns and rifles, the use of a helicopter to survey the area from the air and (allegedly) a police marksman with a rifle on the roof who was clearly visible in silhouette through the glass window in the dome of the courtroom), *Coghlan v. United Kingdom* (dec.), no. 8535/02, 29 November 2005 (in which a defendant was handcuffed for transfer to and on arrival in the court but not during his trial, two police officers sat in court in front of the dock in standard street uniform (including a belt equipped with a baton, mace spray and handcuffs), three prison officers were immediately behind him in the dock and one prison officer sat beside him, another defendant had one security officer sitting next to him and another security officer sat next to the door to the cells and the trial judge had explicitly stated to the jury in his summing-up that the degree of security surrounding the first defendant was appropriate to the seriousness of the case and the difference in the treatment of the two defendants was explained by the first one's prior escape attempt) and Simon Price v. United Kingdom, no. 15602/07, 15 September 2016 (the presumption of innocence was not considered to be impinged upon by the following security measures in respect of an accused who had a history of serious offending, and who was currently standing trial for an extremely serious offence concerning the importation of cocaine worth GBP 35 million, had attempted to "fix" a jury during a previous trial: (a) the assignment of a security team to chaperone the jury at all times; (b) the identification of the jury by number and not by name; (c) the verification by police of the identity of anyone wishing to enter the courtroom's public gallery; (d) the search of members of the public entering the building; (e) the retention of all visitors' mobile telephones during the trial; (f) the erection of protective screens to shield the jury and the applicant from the public gallery; and (g) the covering of the glass panels in the doors to the court room to prevent people seeing into the room. The European Court stated that "91. Furthermore, having ordered the security measures, the trial judge took considerable care to ensure that they did not prejudice the applicant in the eyes of the jury. The Court has recognised the important role played by the trial judge's direction in a trial by jury … and in the present case it is noteworthy that he expressly warned the jury both at the beginning of the trial and in his summing-up that "none of these measures are to be regarded as any reflection whatsoever on the defendant and they are entirely irrelevant to the issue as to whether he is 'guilty' or 'not guilty'" … Although there was at least one incident in which a jury member reported a safety concern to the trial judge, this cannot, by itself, support the applicant's claim that the security measures resulted in actual prejudice. Even if the incident could be directly linked to anguish engendered by the security measures, at the very most it suggests that a member of the jury had inferred that the applicant was dangerous. As noted at paragraph 88 above, this cannot be equated with a presumption of guilt in respect of the offences for which he was being tried"; para. 91.

[66] See *Svinarenko and Slyadnev v. Russia* [GC], no. 32541/08, 17 July 2014, in which the European Court stated of the keeping of the accused in a metal cage in the courtroom that their case "was tried by a court composed of twelve jurors, with two further substitute jurors present, and the presiding judge. It also notes the presence in the courtroom of other participants in the proceedings, including a large number of witnesses – more than seventy gave testimony at the trial – and candidate jurors who appeared before the court for the empanelling process (see paragraph 38 above), as well as the fact that the hearings were open to the general public. It considers that the applicants' exposure to the public eye in a cage must have undermined their image and must have aroused in them feelings of humiliation, helplessness, fear, anguish and inferiority … [and they] must have had objectively justified fears that their exposure in a cage during hearings in their case would convey to their judges, who were to take decisions on the issues concerning their criminal liability and liberty, a negative image of them as being dangerous to the point of requiring such an extreme physical restraint, thus undermining the presumption of innocence. This must have caused them anxiety and distress, given the seriousness of what was at stake for them in the proceedings in question" (paras. 129 and 133).

within a reasonable time, whether because of delays attributable to the non-attendance of jurors at hearings[67] or for other reasons connected with a trial by jury[68].

51. It is also possible that the conduct of a trial could be regarded as unfair in the event of it being established that a jury has not properly discharged its responsibilities in determining a case but the probability of this being demonstrated will be low where a jury's deliberations are secret[69].

H. A reasoned verdict

52. This sub-section considers the need for every determination of a criminal charge to be reasoned and the manner in which this requirement can be satisfied in the particular context of jury trials, as well as certain difficulties in this regard that have been encountered in practice.

(1) In general

53. It is well-established in the case law of the European Court that the right to a fair hearing under Article 6(1) requires that a judgment determining a criminal judge

[67] Such as occurred in *Polonskiy v. Russia*, no. 30033/05, 19 March 2009 ("Twenty-two hearings did not go ahead because the members of the jury failed to appear and were not replaced by substitutes for unclear reasons"; para. 169) and *Shahanov v. Bulgaria*, no. 16391/05, 10 January 2012 ("the bulk of the delay in his case was due to reasons beyond his control, such as the non-appearance of witnesses, experts or even judges or jurors"; para. 79). See also *Ilijkov v. Bulgaria*, no. 33977/96, 26 July 2001, in which the European Court stated that it "further observes that the state of health of the presiding judge and the lay judges caused very significant delays. It necessitated the adjournment of the hearings listed for 19 April 1995, 9 June 1995 and 12 January 1996 and, eventually, the trial had to be restarted (see paragraphs 18, 21, 22 and 26 above). As a result, the time between the beginning of the trial and January 1996 - one year and ten months - was wasted. The Court cannot accept the Government's submission that those delays were inevitable in their entirety. The appointment of one substitute judge could have prevented at least one of the adjournments. Furthermore, the fact that the domestic legislation, as interpreted by the Government in their submissions, only allowed the participation of one reserve judge does not relieve the national authorities of their responsibility under the Convention. They were under an obligation to secure the enjoyment of the rights under Article 6 § 1 of the Convention through legislative or other means" (para. 116). However, concern to avoid delay should not lead to the taking of action that could result in an unfair trial; see *Ivens v. United Kingdom* (dec.), no. 40157/98, 3 April 2001, in which the judge had discharged a juror after it emerged that he had been bribed and had then proceeded with the trial, saying that he was reluctant to order a retrial because it would delay the proceedings when this was not a factor which the judge should have considered in exercising his discretion.

[68] Thus, in *Henworth v. United Kingdom*, no. 515/02, 2 November 2004, it was emphasised that "there was a clear public interest in a jury deciding one way or another whether the charge was established, in the interests of the proper administration of justice, especially when such a serious crime had been committed. However, this does not detract from the need to ensure that the proceedings were conducted with particular diligence"; para. 29. Moreover, in *Moiseyev v. Russia*, no. 62936/00, 9 October 2008 a factor in finding a violation of Article 6(1) was the repeated replacement of the judges, including the lay ones, in a case which meant that the proceedings had to be started anew each time a new member joined the formation"; see paras. 179 and 191. See also the observation in *Sutyagin v. Russia*, no. 30024/02, 3 May 2011 that "If the intention behind the transfer [of the trial judge] had been to avoid the delay in examining the case, such counterarguments as the need to carry out the selection of a new composition of the jury and start the trial from zero should have been taken into account too"; para. 190.

[69] In *Medenica v. Switzerland* (dec.), no. 20491/92, 16 December 1999 it was unsuccessfully asserted that declarations made to the press by a juror amounted to an acknowledgement that he had not listened to, or had not heard, and understood anything in the record so that the jury's deliberations were to be regarded as irregular.

should be reasoned, notwithstanding that there is no reference to this requirement in the actual text of the provision[70].

54. Reasoning is considered necessary for the purpose of exercising any right of appeal[71], in order to know that arguments have been addressed[72] and so that there can be public scrutiny of the judgment[73].

55. The extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case. However, there should be sufficient clarity as to the grounds on which a ruling is based. This will generally require a specific and express reply to a submission but its implied rejection may be acceptable if this is clear[74].

56. Although the obligation of courts to give reasons for their decisions cannot be understood as requiring a detailed answer to every argument[75], there will always be a need to show why key submissions have not been accepted[76] and a mere reference to

[70] See also the stipulation in paragraph 3 of Opinion No.11 (2008) of the Consultative Council of European Judges (CCJE) that "Clear reasoning and analysis are basic requirements in judicial decisions and an important aspect of the right to fair trial" and the elaboration as to what reasoning entails in paragraphs 34-49; https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE(2008)OP11&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true.

[71] Thus, the European Court has stated that "The national courts must, however, indicate with sufficient clarity the grounds on which they based their decision. It is this, inter alia, which makes it possible for the accused to exercise usefully the rights of appeal available to him" (*Hadjianastassiou v. Greece*, no. 12945/87, 16 December 1992, at para. 33) and that "The lack of a reasoned decision also hindered the applicant from appealing in an effective way against that refusal. This is shown by the Court of Appeal's decision to reject the request to consider the evidence on the ground that it should have been adduced in the District Court and that the applicant had not shown that she had not been allowed, or had been unable, to do so" (*Suominen v. Finland*, no. 37801/97, 1 July 2003, at para. 38). The need, in connection with an appeal, for a reasoned decision is closely linked to right under article 6(3)(b) to have adequate time and facilities for the preparation of one's defence; see the discussion of *Hadjianastassiou v. Greece*, no. 12945/87, 16 December 1992 in fn. 86 below.

[72] "A further function of a reasoned decision is to demonstrate to the parties that they have been heard"; *Tatishvili v. Russia*, no. 1509/02, 22 February 2007, at para. 58.

[73] "It is only by giving a reasoned decision that there can be public scrutiny of the administration of justice"; *Tatishvili v. Russia*, no. 1509/02, 22 February 2007, at para. 58.

[74] See, e.g., *Hiro Balani v. Spain*, no. 18064/91, 9 December 1994, at para. 28 and *Elo v. Finland* (dec.), no. 30742/02, 20 January 2004, at para. 2.

[75] See, e.g., *Perez v. France* [GC], no. 47287/99, 12 February 2004, at paras. 77-84.

[76] See, e.g., *Nechiporuk and Yonkalo v. Ukraine*, no. 42310/04, 21 April 2011 ("279. Turning to the present case, the Court notes that: firstly, the courts decided to attach weight to the accusatory statements of Mr K. in disregard of specific and pertinent facts with a potential to undermine their reliability and accuracy; secondly, it was never established in a convincing manner that Mr K. had made those statements of his own free will – the fact that he had pursued that approach in the court might merely have resulted from continuing intimidation; and, lastly, the statements of Mr K. became consistently unfavourable for the first applicant from the time of his questioning, coinciding with his own detention. 280. The Court has held, in the context of its examination of the fairness of civil proceedings, that by ignoring a specific, pertinent and important point of the applicant, the domestic courts fall short of their obligations under Article 6 § 1 of the Convention (see Pronina v. Ukraine, no. 63566/00, § 25, 18 July 2006). It observes a similar issue in the present case, where that requirement, although being even more stringent in the context of criminal proceedings, was not met. 281. Having regard to the above considerations, the Court concludes that there has been a violation of Article 6 § 1 of the Convention in this regard"), *Jannatov v. Azerbaijan*, no. 32132/07, 31 July 2014 ("81. … The Court observes that the Assize Court referred to the statements that the applicant's brother and P.M. had made during the investigation without considering the applicant's complaint on their authenticity and their use in the proceedings against him. In

a particular legal provision without further elaboration is unlikely to be considered sufficient[77].

57. All reasons must be good ones under the law of the State concerned[78].

58. There will always be a need to address inconsistencies in the evidence presented to the court[79] as well as to explain the adoption of a different approach to the validity of decisive evidence from that taken previously in related proceedings[80].

59. Furthermore, there must be an adequate evidential basis for the particular conclusions reached[81].

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particular, the Assize Court did not explain why it relied on the statements that the applicant's brother and P.M. had made during the investigation rather than their statement made at trial which were in line with the applicant's statement made at trial. 82. As to the appellate courts, they did not consider the applicant's complaint and their judgments are silent in this respect. In these circumstances, the Court is not convinced that the applicant had an effective opportunity to challenge the authenticity of the evidence and to oppose its use in the domestic proceedings, as his complaints in this respect were not adequately considered by the domestic courts"), *Ibrahimov and Others v. Azerbaijan*, no. 69234/11, 11 February 2016 ("Furthermore, the applicants' arguments before the domestic courts concerned both the factual circumstances and the legal issues of their cases. The applicants consistently argued that they had not disobeyed an order of a police officer, and that they had been arrested for participation in a peaceful demonstration. They also challenged the legality of the police's interference with the demonstration. In particular, in their appeals they argued that the legal basis invoked by the police for their arrest had been arbitrary; and that there were no circumstances justifying dispersal of the demonstration since it had been peaceful. In the Court's opinion, those arguments were both important and pertinent. Nevertheless, the domestic courts, in particular the Court of Appeal, which examined the applicants' written arguments on the issue, ignored them altogether"; para. 105).

[77] See, e.g., *Sakkapoulos v. Greece*, no. 61828/00, 15 January 2004, in which the judgment just cited provisions in the Code of Criminal Procedure and concluded that they applied in the applicant's case without giving any further reasons.

[78] See, e.g. *De Moor v. Belgium*, no. 16997/90, 23 June 1994; "the Bar Council did not give the applicant's case a fair hearing inasmuch as the reason it gave was not a legally valid one" (para. 55).

[79] See, e.g., *Kuznetsov and Others v. Russia*, no. 184/02, 11 January 2007 ("84. … The Court is struck by the inconsistent approach of the Russian courts, on the one hand finding it established that the Commissioner and her aides had come to the applicants' religious meeting and that it had been terminated ahead of time, and on the other hand refusing to see a link between these two elements without furnishing an alternative explanation for the early termination of the meeting. Their findings of fact appear to suggest that the Commissioner's arrival and the applicants' decision to interrupt their religious service had simply happened to coincide. That approach permitted the domestic courts to avoid addressing the applicants' main complaint, namely that neither the Commissioner nor the police officers had had any legal basis for interfering with the conduct of the applicants' religious event. The crux of the applicants' grievances – a violation of their right to freedom of religion – was thus left outside the scope of review by the domestic courts which declined to undertake an examination of the merits of their complaint. 85. In these circumstances, the Court finds that the domestic courts failed in their duty to state the reasons on which their decisions were based and to demonstrate that the parties had been heard in a fair and equitable manner") and *Ajdarić v. Croatia*, no. 20883/09, 13 December 2011 ("51. … the Court finds that in the present case the decisions reached by the domestic courts were not adequately reasoned. Thus, obvious discrepancies in the statements of witnesses as well as the medical condition of S.Š. were not at all or not sufficiently addressed. In such circumstances it can be said that the decisions of the national courts did not observe the basic requirement of criminal justice that the prosecution has to prove its case beyond reasonable doubt and were not in accordance with one of the fundamental principles of criminal law, namely, in dubio pro reo").

[80] Which did not occur in *S. C. IMH Suceava S.R.L. v. Romania*, no. 24935/04, 29 October 2013.

[81] See, e.g., *Salov v. Ukraine*, no. 65518/01, 6 September 2005 ("91. The Court is not satisfied with the Government's explanations as to why the applicant was convicted, after his case had been heard for the second time, on the basis of the evidence and indictment as initially submitted by the prosecution and the instructions given by the Presidium of the Donetsk Regional Court, while the evidence presented by the prosecution had not

60. Finally, the reasons for any verdicts, i.e., convictions and/or sentences should be given by the judges who had pronounced them and not by other judges who had not participated in the trial[82].

(2) In jury cases

61. It is very unusual for juries to give reasons for their verdicts and, indeed, in almost all legal systems that have the traditional jury model none are given[83].

62. However, although the European Court does not require that the verdict of a jury be itself reasoned[84], it has never considered that the use of a jury necessarily dispensed with the need to comply with the requirement that a judgment be reasoned in some sense. Thus, in its view, the requirements of a fair trial will only be satisfied in jury trials, as much as any other form of trial, if the accused and indeed the public are able

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changed, and considers that the District Court's reasons for departing from its previous findings were not sufficiently explained in the judgment of 6 July 2000") and *Gradinar v. Moldova*, no. 7170/02, 8 April 2008 ("114. The Court concludes that while accepting as "decisive evidence" (see paragraph 75 above) the self-incriminating statements made by the accused, the domestic courts chose simply to remain silent with regard to a number of serious violations of the law noted by the lower court and to certain fundamental issues, such as the fact that the accused had an alibi for the presumed time of the murder. The Court could not find any explanation for such omission in the courts' decisions and neither did the Government provide any clarification in this respect. 115. In the light of the above observations and taking into account the proceedings as a whole, the Court considers that the domestic courts failed to give sufficient reasons for convicting G. and thus did not satisfy the requirements of fairness as required by Article 6 of the Convention").

[82] *Cerovšek and Božičnik v. Slovenia*, no. 68939/12, 7 March 2017. In this case, no written judgments had been prepared by the trial judge, who subsequently retired. Following notice of appeal having been given by the defendants, written judgments had been given, three years after the conviction, by judges who had not participated in their trials. Even if there had been administrative or procedural factors that rendered the trial judge's continued participation in the case impossible, which it doubted, the European Court considered that "the only way to compensate for Judge A.K.'s inability to produce reasons justifying the applicants' conviction would have been to order a retrial, by, for instance, the second-instance court remitting the cases to the first-instance court for a new hearing (see paragraph 26 above). The reason for that is because when Judge A.K. retired the verdicts had already been pronounced and the applicants' statements and witness testimony constituted relevant evidence for them"; para. 45. Furthermore, the defect could not be remedied by appellate proceedings in which the court concerned did not hear directly any of the evidence.

[83] "57. In Spain the jury's verdict is made up of five distinct parts. The first lists the facts held to be established, the second lists the facts held to be not established, the third contains the jury's declaration as to whether the accused is guilty or not guilty, and the fourth provides a succinct statement of reasons for the verdict, indicating the evidence on which it is based and the reasons why particular facts have been held to be established or not. A fifth part contains a record of all the events that took place during the discussions, avoiding any identification that might infringe the secrecy of the deliberations. 58. Until 1991 the authorities of the Canton of Geneva considered that the jury satisfied the requirement of a reasoned decision by answering "yes" or "no" to the precise questions put to it. However, in a decision of 17 December 1991 the Federal Court found such replies to be insufficient and required juries in the canton to give reasons for their verdicts in future. In 1992 Articles 298 and 308 of the Geneva Code of Criminal Procedure were amended to require the jury to state reasons for its choices should it consider that this was necessary for an understanding of its verdict or its decision. Article 327 of the Code of Criminal Procedure requires the jury to state "the reasons for taking into account or disregarding the main items of evidence and the legal reasons for the jury's verdict and the decision by the court and the jury as to the sentence or the imposition of any measure""; *Taxquet v. Belgium* [GC], no. 926/05, 16 November 2010.

[84] See *Taxquet v. Belgium* [GC], no. 926/05, 16 November 2010, at paras. 89 and 93 and *Lhermitte v. Belgium* [GC], no. 34238/09, 29 November 2016, at para. 66. This was also the position of the former European Commission; see *R v. Belgium* (dec.), no. 15957/90, 30 March 1992 and *Saric v. Denmark* (dec.), no. 31913/96, 2 February 1999.

to understand the verdict that has been given. It has emphasised that this is a vital safeguard against arbitrariness[85].

63. Given that jurors are usually not required or permitted to give reasons for their personal convictions, the European Court has looked to see what other safeguards there were to avoid any risk of arbitrariness and to enable the accused to understand the reasons for his or her conviction.

64. Such safeguards have been found by the European Court to be potentially afforded by both precise, unequivocal questions put to the jury by the judge, forming a framework on which the verdict is based and sufficiently offsetting the fact that no reasons are given for the jury's answers[86] and by directions or guidance provided by the presiding judge to the jurors on the legal issues arising or the evidence adduced[87]. In addition, it will take into account any avenues of appeal that are open to the accused[88].

65. The approach of posing questions to the jury will be regarded as satisfactory where it is possible

> to ascertain from a combined examination of the indictment and the questions to the jury which of the items of evidence and factual circumstances discussed at the trial had ultimately caused the jury to answer the questions concerning the accused in the affirmative, in order to be able to: distinguish between the co-defendants; understand why a particular charge had been brought rather than another; determine why the jury had concluded that certain co-defendants bore less

[85] See *Lhermitte v. Belgium* [GC], no. 34238/09, 29 November 2016, at para. 67.

[86] As in, e.g., *B H, M W, H P and G K v. Austria* (dec.), no. 12774/87, 12 October 1989 ("The applicants then complain that the trial was unfair because some questions to the jury were imprecise, others suggestive. However, the Commission finds nothing in the questions which would allow the conclusion that the trial was unfair"), *R v. Belgium* (dec.), no. 15957/90, 30 March 1992 ("From its examination of the Belgian system the Commission notes that, while the jury may reply only by "yes" or by "no" to the questions put by the president, these questions form a framework for the jury's verdict. In the Commission's opinion, the precision of these questions - some of which may be put at the request of the prosecution or the defence - compensates sufficiently for the brevity of the jury's replies. That assessment is supported by the fact that the Assize Court must give reasons for a refusal to put one of the questions raised by the prosecution or the defence to the jury"), *Zarouali v. Belgium* (dec.), no. 20664/92, 29 June 1994, *Planka v. Austria* (dec.), no. 25852/94, 15 May 1996, *Papon v. France (No. 2)* (dec.), no. 54210/00, 15 November 2001 and *Bellerin Lagares v. Spain* (dec.), no. 31548/02, 4 November 2003. The employment of the method of posing of questions was also addressed in *Hadjianastassiou v. Greece*, no. 12945/87, 16 December 1992, in which they had been posed to a courts-martial court by its president. The European Court did not address the adequacy of the questions posed but the failure of the president to mention them when reading out the judgment in the case meant that the courts-martial appeal court had not expressed with sufficient clarity the grounds on which it had based its decision and this meant that it was not possible for the accused to exercise usefully the rights of appeal available to him. As a result the European Court found a violation of the right under article 6(3)(b) to have adequate time and facilities for the preparation of his defence.

[87] As in, *Judge v. United Kingdom* (dec.), no. 35863/10, 8 February 2011, *Beggs v. United Kingdom*, no. 15499/10, 16 October 2012, *Shala v. Norway* (dec.), no. 1195/10, 10 July 2012 and *Lawless v. United Kingdom* (dec.), no. 44324/11, 16 October 2012. See also the stipulation in paragraph 41 of Opinion No.11 (2008) of the Consultative Council of European Judges that "In the case of a jury, the judge's charge to the jury must clearly explain the facts and issues that the jury must decide".

[88] *Ibid.*, at para. 68. However, where a trial is determined by a jury, the restriction of any right of appeal to issues of law will not be incompatible with the right of appeal under Article 2 of Protocol No. 7; see, e.g., *Nielsen v. Denmark* (dec.), no. 19028/91, 9 September 1992, *Jakobsen v. Denmark* (dec.), no. 22015/93, 30 November 1994 and *Planka v. Austria* (dec.), no. 25852/94, 15 May 1996.

> responsibility, thus receiving a lesser sentence; and discern why aggravating factors had been taken into account …. In other words, the questions must be both precise and geared to each individual[89].

66. However, it has found the approach of posing questions insufficient to establish the reasons for a particular conviction where:

- distinct questions were not put in respect of each defendant as to the existence of aggravating circumstances, thereby denying the jury the possibility of determining a particular defendant's individual criminal responsibility[90];
- the questions put did not, even in conjunction with the indictment, enable the one of several co-defendants to ascertain which of the items of evidence and factual circumstances discussed at the trial had ultimately caused the jury to answer the four questions concerning him in the affirmative[91];
- only two succinctly worded questions and made no allusion to the specific circumstances of the case were put to the jury despite the complexity of the case and the limited scope of the indictment[92];
- a single, non-specific and laconic question was put to the jury despite the facts of the case being contested and the motive for its commission being unknown[93]; and
- only two of the four questions put to the jury concerned the defendant, one of which related to premeditation, an issue not retained from the indictment[94];

67. An additional consideration of some significance in several of these cases was that there was no right of ordinary appeal against the conviction[95]. In the others, the availability of an appeal was of no real assistance since either it was not possible to draw anything from the first instance proceedings to establish the reasons for different

[89] *Lhermitte v. Belgium* [GC], no. 34238/09, 29 November 2016, at para. 72. This was what the Grand Chamber inferred from judgment in *Taxquet v. Belgium* [GC], no. 926/05, 16 November 2010.
[90] *Goktepe v. Belgium*, no. 50372/99, 2 June 2005.
[91] Thus, he "was unable, for example, to make a clear distinction between the co-defendants as to their involvement in the commission of the offence; to ascertain the jury's perception of his precise role in relation to the other defendants; to understand why the offence had been classified as premeditated murder (assassinat) rather than murder (meurtre); to determine what factors had prompted the jury to conclude that the involvement of two of the co-defendants in the alleged acts had been limited, carrying a lesser sentence; or to discern why the aggravating factor of premeditation had been taken into account in his case as regards the attempted murder of A.C.'s partner"; *Taxquet v. Belgium* [GC], no. 926/05, 16 November 2010, at para. 97. There were similar rulings in *Castellino v. Belgium*, no. 504/08, 25 July 2013 and *Magy v. Belgium*, no. 43137/09, 24 February 2015.
[92] *Agnelet v. France*, no. 61198/08, 10 January 2013.
[93] *Oulahcene v. France*, no. 44446/10, 10 January 2013.
[94] *Fraumens v. France*, no. 30010/10, 10 January 2013.
[95] Namely, in *Taxquet v. Belgium* [GC], no. 926/05, 16 November 2010, *Castellino v. Belgium*, no. 504/08, 25 July 2013 and *Magy v. Belgium*, no. 43137/09, 24 February 2015. There was the possibility of an appeal to the Court of Cassation on points of law alone, which could not provide an accused with adequate clarification of the reasons for his or her conviction. There was a provision in the Criminal Procedure Code that, if the jurors had made a substantive error, the Assize Court must stay the proceedings and adjourn the case until a later session for consideration by a new jury but the Government recognised that this was a rarely used option.

jurors and professional magistrates either upholding the conviction[96]or the conviction was on appeal following an acquittal at first instance[97].

68. Nonetheless, the posing of questions has been considered a satisfactory approach where:

- the indictment decision was particularly detailed, the twelve questions put to the jury formed a clear and unambiguous whole and the specific questions concerning the aggravating circumstances in the case enabled the jury to weigh the defendant's precise criminal liability[98];
- twenty-seven questions had been asked in relation to all the crimes, with references to the relevant aggravating circumstances, and there was extensive information about the facts in the indictment[99];
- five questions had been put – three referring in general terms to voluntary homicide, theft of articles or money and the fact that the murder would have been used to prepare for the theft, or to allow the escape or impunity of the accused and fourth and fifth questions being directed personally against each of the co-defendants – and it was clear from the indictment each of the two co-defendants supported a version of the facts which necessarily implied the main or exclusive responsibility of the other[100]; and
- the procedure followed – namely the focus of the investigation on the accused's
  personal history, character and psychological state at the time of the killings, an adversarial trial in which a further psychiatric assessment had been ordered following the emergence of new evidence, the question of the accused's criminal responsibility having been a central focus of the trial hearing, the reasoning in the sentencing judgment and the cassation court having noted that consideration of her coldblooded manner and her determination to carry out her crimes had constituted the trial court's reason for finding that she had been criminally responsible at the time of the events - made it possible for the conviction to be understood[101].

69. Furthermore, following a reform in France that required reasons to be given by its assize courts, i.e., those using the collaborative model, there has been one case in which the European Court has found that the appending to the judgment of statement of reasons form in which the number and accuracy of the facts listed had

[96] As in *Oulahcene v. France*, no. 44446/10, 10 January 2013.
[97] As in *Agnelet v. France*, no. 61198/08, 10 January 2013 and *Fraumens v. France*, no. 30010/10, 10 January 2013.
[98] *Legillon v. France*, no. 53406/10, 10 January 2013.
[99] *Bodein v. France*, no. 40014/10, 13 November 2014.
[100] *Voica v. France*, no. 60995/09, 10 January 2013.
[101] *Lhermitte v. Belgium* [GC], no. 34238/09, 29 November 2016.

corresponded to the findings of the investigative division in its indictment, had been sufficient to inform the accused of the reasons for her conviction[102].

70. The use of directions or guidance provided by the presiding judge to the jurors on the legal issues arising or the evidence adduced has been, as already noted[103], considered - when taken with other factors - to fulfil the need for the accused and the public to understand any verdict that has been given.

71. Thus, the European Court has stated of the operation of the jury system in Scotland that

> 36. …the jury's verdict is not returned in isolation but is given in a framework which includes addresses by the prosecution and the defence as well as the presiding judge's charge to the jury. Scots law also ensures there is a clear demarcation between the respective roles of the judge and jury: it is the duty of the judge to ensure the proceedings are conducted fairly and to explain the law as it applies in the case to the jury; it is the duty of the jury to accept those directions and to determine all questions of fact. In addition, although the jury are "masters of the facts" (Simpson, cited above) it is the duty of the presiding judge to accede to a submission of no case to answer if he or she is satisfied that the evidence led by the prosecution is insufficient in law to justify the accused's conviction (see section 97 of the 1995 Act, cited above).
> 37. These are precisely the procedural safeguards which were contemplated by the Grand Chamber at paragraph 92 of its judgment in Taxquet. In the present case, the applicant has not sought to argue that these safeguards were not properly followed at his trial. Nor has he suggested that the various counts in the indictment were insufficiently clear. Indeed, the essential feature of an indictment is that each count contained in it must specify the factual basis for the criminal conduct alleged by the prosecution: there is no indication that the indictment upon which the applicant was charged failed to do so. It must, therefore, have been clear to the applicant that, when he was convicted by the jury, it was because the jury had accepted the evidence of the complainers in respect of each of the counts in the indictment and, by implication, rejected his version of events[104].

72. Similarly, it approved the operation of the Norwegian jury system in the following terms:

> 31. … the Court sees no cause for calling into doubt the Supreme Court's conclusion that a series of safeguards were in place to ensure that the jury reached its verdict following a conscientious assessment of the evidence on the basis of a correct understanding of the law (see paragraph 68 of its leading judgment quoted at paragraph 21 above).
> 32. In the first place, the Court notes that important safeguards existed under national law in respect of the jury's participation in the examination of a case before the High Court. Like the professional judges, the jurors were to hear all the evidence and arguments presented on behalf of the prosecution and the defence. Thereafter, the jury was to decide on the question of guilt by answering "yes" or "no" to questions specifically formulated by the High Court's presiding judge on the basis of a draft prepared by the prosecution and in light of comments by the defence. Articles 363, 364 and 366 set out requirements concerning the degree of precision with which the questions ought to be formulated, with regard to the accused, the criminal matter and the relevant

[102] *Matis v. France*, no. 43699/13, 29 October 2015.
[103] See para. 64 above.
[104] *Judge v. United Kingdom* (dec.), no. 35863/10, 8 February 2011. This assessment was followed in *Beggs v. United Kingdom* (dec.), no. 15499/10, 16 October 2012 ("As in the case of Judge, the present applicant has not sought to argue that the various safeguards identified were not followed at his trial. In particular, the Court has already found that the charge contained in the indictment was clear (see paragraph 140 above). It must, therefore, have been clear to the applicant that, when he was convicted by the jury, it was because the jury had accepted the prosecution evidence and, by implication, rejected his version of events"; para. 162.

penal provision, the description of the particular characteristics of the criminal act and the manner in which the act was committed with reference to time and place (see paragraph 64 of the Supreme Court's judgment at paragraph 21 above).

33. Before the jury withdrew to deliberate in camera, the High Court's presiding judge, in the presence of the prosecution and the defence, explained in a "summing up" to the jury the questions and the applicable legal principles and provided guidance on the evidence, with a possibility for the parties to require that parts concerning points of law be entered on the court records (see paragraph 65 of the Supreme Court's judgment at paragraph 21 above). The jury's verdict was further subject to validation by the professional judges (the modalities of which are described in paragraph 66 of the Supreme Court's at paragraph 21 above).

34. The Court further notes that the procedure included a number of devices aimed at enabling the accused to understand the reasons for his or her conviction. The questions put to the jury should provide information about the facts that the jury had found to be proven. A guilty verdict meant that the jury had found that all the conditions for convicting the accused to be satisfied. Although some questions might remain unanswered, regarding such matters as the scope of the act and the degree of guilt, these would be dealt with in the sentencing (see paragraphs 70 and 71 of the Supreme Court's judgment at paragraph 21 above).

35. Moreover, whilst reasons were not given for the jury's verdict or, for that matter, the professional judges' decision to endorse the verdict – in other words the decision on conviction, reasoning was a requirement for the High Court's decision on sentencing (Articles 39 and 40 of the Code of Criminal Procedure). In this context, there was a long-standing practice (see paragraphs 72 and 73 of the Supreme Court's judgment at paragraph 21 above) whereby the professional judges and the four jury members (the fore-person and three jurors drawn by lot) jointly describe the offence of which the defendant had been convicted as a basis for passing sentence. This was to state what had been found established regarding subjective guilt; in the event of alternative questions having been put to the jury, which one of the alternatives was found established and, where necessary, give details of the scope of the criminal act. Normally, unless there was reason to assume otherwise, the grounds so stated would be representative of the jury's views.

36. Finally, the Court observes that it was open to lodge, to the defendant's benefit, an appeal with the Supreme Court against the High Court's application of the law regarding the question of guilt, its decision on sentencing and its procedure. The Supreme Court had power to review the jury's application of the law on the basis of the presiding judge's recorded summing up to the jury and of the description of the offence given as the reasons for the sentence by the professional judges and the four jurors (see paragraph 80 of the Supreme Court's judgment at paragraph 21 above).

37. Against this background the Court is satisfied that that, for the purposes of the fair hearing guarantee under Article 6 § 1 of the Convention, there were sufficient safeguards in place to avoid any risk of arbitrariness and to enable the accused to understand the reasons for his or her conviction.

38. As to the further issue concerning the manner of application of these safeguards to the instant case, the Court is unable to agree with the applicant's contention that inadequate reasons had been given by the High Court for his conviction under Article 60A of the Penal Code for having committed the various drugs offences as part of the activities of an organised criminal group and that this shortcoming had not been offset by the questions put to the jury. It is not apparent that the applicant or his counsel during the High Court proceedings expressed any objections or made any suggestions to the manner in which the questions to the jury were formulated, although given an opportunity to do so.

39. Be that as it may, the Court is in any event satisfied that the information contained in the questions to the jury, which were geared towards the applicant individually, and in the reasons given by the professional judges and the four jurors as their basis for sentencing was sufficient to enable the applicant to understand his conviction on the Article 60A charges (see paragraphs 15 and 18 above; compare Taxquet [G.C.], cited above, §§ 96-98). His suggestion that he ought to have been in a position to understand the High Court's findings regarding the national and/or ethnic profiles of the groups in question and that inadequate reasoning had been given in this respect appears unfounded[105].

[105] *Shala v. Norway* (dec.), no. 1195/10, 10 July 2012.

73. Apart from these rulings, there have been no other cases in which the European Court has had to examine the adequacy of directions or guidance to a jury from the specific perspective of either of these being adequate for the purpose of understanding the verdict concerned.

74. Nonetheless, as has already been seen, it has assessed particular directions from the perspective of whether they could be regarded as sufficient to remedy any problem with respect to impartiality[106] and prejudicial media coverage[107].

75. In addition, there have been some cases in which directions to the jury were considered to be "fair" without further elaboration[108], two in which the summing-up of the evidence was considered to be appropriate[109], one in which the approach to the availability of a defence was unsuccessfully challenged[110], another in which no arbitrariness or capriciousness was found in the approach of an appeal court when it determined that a misdirection by the judge to the jury had not mislead it in a material way[111] and one in which the direction was, despite some deficiencies, still sufficient for the purpose of guiding the jury as to the weight to be attached to particular evidence[112].

[106] See para. 34 above.
[107] See para 42 above.
[108] Namely, *X v. United Kingdom* (dec.), no. 5574/72, 21 March 1975 and *Braithwaite v. United Kingdom* (dec.), no. 15123/89, 18 April 1991.
[109] *Pullicino v. Malta* (dec.), no. 45441/99, 15 June 2000 ("Indeed the Court finds the judge's summing up to the jury balanced and in no way unfair to the case for the defence") and *McGlynn v. United Kingdom* (dec.), no. 40612/11, 16 October 2012 ("A full transcript of the trial judge's summing up has been provided to the Court. There is no basis for the applicant's allegation that it was emotive in nature. In respect of the complaint that it was unfair because it summarised the defence case prior to summarising the prosecution case, the Court agrees with the Court of Appeal that this was of no real moment. Finally, contrary to the applicant's submissions, there is no rule in the Convention which requires a trial judge, when summing up a case, to use the same words as have been used by the defendant or his counsel. This complaint must therefore be rejected as manifestly ill-founded"; para. 32).
[110] *Randall v. United Kingdom* (dec.), no. 4401/98, 5 December 2000 (in relation to the accused's alleged diminished responsibility).
[111] *Moore v. United Kingdom* (dec.), no. 32874/96, 11 September 1997 ("The appeal court however was not persuaded by the applicant's counsel that the words had the significance to mislead in a material way, in the context that the applicant's defence of accident and the other surrounding circumstances were put clearly to the jury and that the words, in either sense, were pertinent to the applicant's mood at the time of the incident. The Commission does not consider that the appeal court's approach discloses any arbitrariness or capriciousness. While it is true that the appeal court could not be certain of the effect the misdirection had on the jury, the Commission is not satisfied that its appreciation that the misdirection was not material discloses any unfairness in the circumstances of the case").
[112] *Al-Khawaja and Tahery v. United Kingdom* [GC], no. 26766/06, 15 December 2011; "157. It is true that the judge's direction to the jury was found to be deficient by the Court of Appeal. However, the Court of Appeal also held that it must have been clear to the jury from that direction that, in consequence of the applicant's inability to cross-examine S.T. and the fact that they were unable to see and hear her, her statement should carry less weight with them (see paragraph 22 above). Having regard to this direction, and the evidence offered by the prosecution in support of S.T.'s statement, the Court considers that the jury was able to conduct a fair and proper assessment of the reliability of S.T.'s allegations against the first applicant".

76. There have also been a number of cases concerned with the approach to the handling of various evidential issues[113] and many cases involving the appropriateness of drawing of inferences from an accused's silence either when questioned by the police or in the course of the trial was fair[114] (in only two of which were the directions not considered compatible with Article 6(1)[115].

77. In addition, the content of the directions given to a jury has also been recognised as one of the factors to be taken into account when examining the proceedings as a whole in order to assess the impact of procedural failings at the pre-trial stage on the overall fairness of the criminal proceedings[116].

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[113] *Sawoniuk v. United Kingdom* (dec.), no. 63716/00, 29 May 2001 and *Pereira v. United Kingdom* (dec.), no. 40741/02, 8 April 2003 (possibly prejudicial evidence*), Perry v. United Kingdom* (dec.), no. 63737/00, 26 September 2002 (the reliability and quality of the identification evidence), *Stanford v. United Kingdom* (dec.), no. 73299/01, 12 December 2002 (the probative value of certain evidence), A*shendon and Jones v. United Kingdom*, no. 35730/07, 13 September 2011 (the need for a "proper, logical, objective analysis" of what had happened), *Firkins v. United Kingdom* (dec.), no. 33235/09, 4 October 2011 (the admissibility of evidence) and *Ellis, Simms and Martin v. United Kingdom* (dec.), no. 46099/06, 10 April 2012 and *Lawless v. United Kingdom* (dec.), no. 44324/11, 16 October 2012 (the reliability of certain evidence).

[114] The cases relating to silence during interrogation are *McDonnell v. United Kingdom* (dec.), no. 40768/98, 25 May 1999, *Condron v. United Kingdom*, no. 35718/97, 2 May 2000, *Beckles v. United Kingdom*, no. 44652/98, 8 October 2002, *Owen v. Unite Kingdom* (dec.), no. 37983/97, 28 August 2001, *Tomlinson v. United Kingdom* (dec.), no. 42456/98, 28 August 2001, *Kavanagh v. United Kingdom* (dec.), no., 39389/98, 28 August 2001, *Coghlan v. United Kingdom* (dec.), no. 8535/02, 29 November 2005, *Shukla v. United K*ingdom (dec.), no. 2526/07, 16 June 2009, *Ellul v. Malta* (dec.), no. 18790/07, 8 September 2009, *Adetoro v. United Kingdom*, no. 46834/06, 20 April 2010 and *Boyle v. United Kingdom* (dec.), no. 29949/07, 22 June 2010. Those involving silence during the trial are *Smith v. United Kingdom* (dec.), no. 64714/01, 12 December 2002, *Chadwick v. United Kingdom* (dec.), no. 54109/00, 18 November 2003, *Wood v. United Kingdom* (dec.), no. 23414/02, 20 January 2004, *O'Carroll v. United Kingdom*, no. 35557/03, 15 March 2005, *Tabbakh v. United Kingdom*, no. 40945/09, 21 February 2012 and *O'Donnell v. United Kingdom* (dec.), no. 16667/10, 7 April 2015.

[115] *Condron v. United Kingdom*, no. 35718/97, 2 May 2000 and *Beckles v. United Kingdom*, no. 44652/98, 8 October 2002.

[116] *Ibrahim and Others v. United Kingdom* [GC], no. 50541/08, 13 September 2016; "In his summing-up to the jury, later described by the Court of Appeal as "the product of characteristic thoroughness and accuracy", the trial judge summarised the prosecution and defence evidence in detail and carefully directed the jury on matters of law (see paragraphs 106-118 and 127 above). He set out in detail the circumstances of each of the applicants' arrests and interviews, including the contents of the interviews and the applicants' explanations for the lies that they had told. He also summarised the extensive prosecution and defence evidence in the case. He expressly instructed the jury to take into account when considering the lies told by the applicants that they had been questioned before having had access to legal advice. He explained that this was a right normally afforded to suspects. He gave examples of advice which might have been given by a lawyer and which might have persuaded the applicants to act differently. He further directed the jury to bear in mind that incorrect cautions had been used (see paragraphs 74, 79, 82 and 107 above), explaining that this was potentially confusing for the applicants and might have put inappropriate pressure on them to speak. He pointed out, however, that they had not in fact been pressured into revealing anything relied on at trial but had lied. He instructed the jury members that unless they were sure that each applicant had deliberately lied, they were to ignore the lies told. If, on the other hand, they were satisfied that the lies were deliberate, they were required to consider why the applicant had lied. The judge explained to them that the mere fact that a defendant had lied was not in itself evidence of guilt, since he might have lied for many, possibly innocent reasons. He reminded them that the applicants had put forward a variety of reasons as to why they had lied and told the jury members that if they were satisfied that there was an innocent explanation for the lies told then no notice should be taken of those lies. The lies could only be used as evidence to support the prosecution cases if the jury was sure that the applicants had not lied for innocent reasons. The judge also emphasised that the jury was not permitted to hold it against the applicants that they had failed to mention in the safety interviews matters on which they relied in court. Again, he reminded them that legal advice had been denied to them before the safety interviews. He further instructed the jury to

78. Moreover, as a safeguard to ensure fairness, the European Court and the former European Commission have emphasised the potential importance of appeals in cases where directions have been given by a judge to the jury, particularly where there was a possible misdirection[117] or there are matters to be considered which could affect the verdict reached[118].

79. The fact that it is for a jury to apply the criminal law to the facts of the case before them does not mean that it can then be successfully claimed that the effect of the law will be unforeseeable and thus incompatible with the prohibition on retrospective criminal liability in Article 7 of the European Convention. Certainly, no problem will arise where some discretion is left to the jury as to how to apply concepts such as "reasonableness" so long as its scope and the manner of its exercise are indicated with sufficient clarity in the directions given by the judge[119].

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bear in mind as regards Mr Ibrahim that he had been incorrectly denied legal advice by telephone before his safety interview" (para. 292).

[117] See, e.g., *Nielsen v. Denmark* (dec.), no. 19028/91, 9 September 1992 ("In the present case the Commission recalls that the applicant could under Danish law appeal against the judgment of the High Court of Western Denmark to the Supreme Court. Such an appeal could be based on the allegations that procedural rules were disregarded or applied wrongly. The applicant could also have based his appeal on allegations that the High Court had wrongly decided matters which fell outside the jury's competence, that the jury had received wrong instructions as to the legal aspects of the case, or that the questions put to the jury suffered from errors or were based on an incorrect interpretation of the Penal Code. Finally, the applicant could, and did, base his appeal on the allegation that the sentence was disproportionate to the offence committed"), *Moore v. United Kingdom* (at fn. 111), and *Randall v. United Kingdom* (dec.), no. 4401/98, 5 December 2000 ("The Court notes that the applicant has not substantiated in what way he was unable to deal with the terms of the judge's direction on this issue in cross-examination. In any event, it observes that the applicant was able to take this grievance on appeal. The Court of Appeal concluded that it found no reason to impugn the judge's approach to the applicant's alternative defences of diminished responsibility and provocation. For its part, the Court sees no reason to do so either and finds that the applicant's complaint under this head does not disclose an appearance of a violation of Article 6 § 1"; para. 1. See also *Cf. Condron v. United Kingdom*, no. 35718/97, 2 May 2000 ("63. The Court does not agree with the Government's submission that the fairness of the applicants' trial was secured in view of the appeal proceedings. Admittedly defects occurring at a trial may be remedied by a subsequent procedure before a court of appeal and with reference to the fairness of the proceedings as whole (see the Edwards v. the United Kingdom judgment of 16 December 1992, Series A no. 247-B, pp. 34-35, §§ 34 and 39). However, as noted previously, the Court of Appeal had no means of ascertaining whether or not the applicants' silence played a significant role in the jury's decision to convict. The Court of Appeal had regard to the weight of the evidence against the applicants. However it was in no position to assess properly whether the jury considered this to be conclusive of their guilt"; para. 63).

[118] See, e.g., *Oyston v. United Kingdom* (dec.), no. 42011/96, 22 January 2002 ("The Court notes that the applicant refers to the case of Condron v. the United Kingdom (cited above) where it held that the failure of the trial judge to give a proper direction to the jury about the adverse inferences which could be drawn from the accused's failure to answer police questions was a defect that could not be remedied on appeal. It had regard in that assessment to the fundamental importance of the right to silence which was issue in that case. The Court considers that the facts of the present case are more analogous to those pertaining in Edwards v. the United Kingdom where, as in this case, the Court of Appeal had reviewed evidence coming to light after the applicant's trial. There the Court found that the rights of the defence were secured by the proceedings before the Court of Appeal, where the applicant's counsel had every opportunity to seek to persuade the court that the conviction should not stand in light of the new material, and that the Court of Appeal was able to assess for itself the value of the new evidence and to determine whether the availability of the information at trial would have disturbed the jury's verdict"). A similar ruling was given in *Mansell v. United Kingdom* (dec.), no. 60590/00, 21 January 2003.

[119] See *Jobe v. United Kingdom* (dec.), no. 48278/09, 14 June 2011, which concerned "reasonable excuse" as a defence to offences connected with the collection of information of a kind likely to be useful to a person

4. The Provisions on Jury Trial in the Criminal Procedure Code of Georgia and the Criminal Code of Georgia

80. This section of the Report is concerned with the compliance with European standards of the provisions in the Criminal Procedure Code of Georgia dealing with jury trials and the related provisions in the Criminal Code of Georgia.

81. The analysis in this section has been based on unofficial English translations of the two Codes.

82. Remarks will not be made with respect to those provisions in the two Codes that are considered appropriate or unproblematic unless this is relevant to an appreciation of other provisions that might require attention.

83. *Recommendations for any action that might be necessary to ensure compliance with European standards – whether in terms of modification, reconsideration or deletion - are italicised, as are any other conclusions.*

A. Criminal Procedure Code of Georgia

Articles 21[1] and 226

84. These provisions do not envisage jury trials being at present universally available as regards either jurisdiction of courts in which these can be held[120] or the offences for which they are applicable[121]. However, this is not problematic as far as the European

committing or preparing an act of terrorism; "The Court accepts that the effect of the House of Lords' ruling may well be that, in the majority of cases, the issue of a reasonable excuse was for the jury to determine. However, the fact that it is for a jury to apply the criminal law to the facts of the case before them does not mean the effect of the law is unforeseeable. Conferring a discretion on a jury is not in itself inconsistent with the requirements of the Convention, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity (see O'Carroll v. the United Kingdom (dec.), no. 35557/03, 15 March 2005). This is no less true for the concept of reasonableness. In any criminal justice system based on trial by jury many defences are left for the jury to decide. Frequently, those defences involve an assessment of reasonableness, such as whether reasonable force has been used in self-defence. In any such case, any uncertainty is considerably lessened by the fact that the jury will have the benefit of full submissions from prosecution and defence counsel and the directions contained in the trial judge's summing up. Indeed the House of Lords' ruling in the applicant's case gave clear directions as to the factors which a trial judge could indicate to a jury in considering the issue of "reasonable excuse" under section 58(3) (see paragraph 81 of the ruling, quoted above). These factors provide full and appropriate guidance as to the scope of the jury's discretion under section 58(3) and how that discretion should be exercised. Finally, there is a difference between not knowing what may constitute a reasonable excuse and not knowing whether a jury will regard a particular excuse as reasonable. The Court considers that, despite his submissions, the applicant's case fell into the latter category. As a matter of tactics, it may have been wise for him to plead guilty in order to avoid the uncertainties of a trial but that does not mean that, as a matter of law, the offence with which he was convicted was unforeseeable. It was not, therefore, incompatible with Article 7 of the Convention".

[120] Under Article 211 jury trials can be held in the Tbilisi, Kutaisi, Batumi and Rustavi city courts, although the definition of the exact territorial of these courts is a matter for a decision of the High Council of Justice.

[121] Article 226 prescribes the specific offences under the Criminal Code of Georgia, which are the only ones for which jury trial is available. These offences, which are based on some or all of the provisions in just 17 of its 414 Articles.

Convention is concerned since, as has been seen[122], there is no right to jury trial under it either in general or for specific types of offences.

85. The offences for which jury trial is available range over all three categories of crime, namely, those that are less serious, serious or particularly serious under the Criminal Code of Georgia. Most, however, fall into the latter two categories.

Article 27

86. The first paragraph of this provision provides that juries are to be composed of 12 jurors plus 2 reserve jurors. However, it then provides for different minimum numbers – 6, 8 or 10 – depending upon whether the offences involved are respectively less serious, serious or particularly serious.

87. It is clear that from Article 224 that every jury trial should start with a jury composed of 12 jurors and at least 2 reserve jurors. The ability to rely on the prescribed minimum numbers presumably arises pursuant to the need to release certain jurors in the course of the trial who are not able to fulfil their duty pursuant to Article 232 but this is not specified.

88. *It should thus be made clear that a jury with less than 12 members should only be possible where certain of those appointed have not been able to fulfil their duties rather than use the unclear phrase "except for the cases specified in this Code".*

89. There is no European standard as to the specific number of jurors that there should be on a jury but it should be borne in mind that the size of a jury has been recognised by the European Court as one of safeguards where potential problems of impartiality arise[123].

90. Moreover, the reduction in the size of a jury as the trial proceeds also has implications for the extent of the majority required for a conviction pursuant to Article 261.4.

91. It should be borne in mind that the significant reduction in the extent of the majority required may run counter to a key objective of the introduction of the jury system, namely, increasing public confidence in the justice system. This will especially be so if there is a wide discrepancy in practice between the majorities required by different juries to convict the persons that they have tried.

92. It is noted that Article 224 provides for the possibility of a presiding judge approving more reserve jurors than the 2 specified in the present provision on account of "the complexity of the case". However, it does not seem appropriate to confine the need for a larger jury only to cases that are "complex", particularly as it may not always be

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123 See para. 30 above.

evident at the outset that cases are marked by this characteristic and problems of impartiality will not only be limited to those that do have it.

93. *Although some comments will be made below as to the circumstances in which jurors are released and the prescribed number of jurors necessary for a majority verdict*[124]*, consideration should also be given to increasing the number of reserve jurors to be appointed in all cases so that it will be rare, if at all, that there is a need to rely upon a minimum-sized jury*.

Article 28

94. There are two aspects of the arrangements made in this provision regarding the social guarantees of jurors that appear potentially problematic.

95. The first arises from the provision in paragraph 2 for employed persons to retain their work, position and wages.

96. This necessarily imposes a burden on the employer but, as jury service, is recognised as a legitimate civic obligation by the European Court,[125] it is unlikely that such a burden would be seen to be a disproportionate one and thus potentially a violation of the right to the peaceful enjoyment of possessions under Article 1 of Protocol No. 1, at least in cases where jury service does not prove to be unduly long and thus expensive for the employer who has to pay both the juror and a replacement employee.

97. However, the fact that the provision is made for the economic protection of employees but not those who are self-employed could well be seen to engage the prohibition on discrimination in Protocol No. 12 since the financial position of only the former is being secured even though both are performing an identical public service. It may be that the differential treatment could be seen to have a rational and objective justification in that the position of employees might be more precarious. That might, of course, change in the case of a prolonged trial.

98. Moreover, the potential problems for a business of the absence of its owner on jury service could lead to an expansive application of the ability under Article 31(b), taken in conjunction with paragraph 3 of the present provision, to refuse to act as a juror on account of the potential for any substitution in respect of his or her work to cause substantial damage, particularly if the cost involved might make it impractical to hire someone suitable. As a consequence juries could be composed exclusively of employees and thus not reflect a good cross-section of society.

[124] See paras. 160-165 and 191-192 below.
[125] See paras. 14-15 above.

99. *Consideration should thus be given to making arrangements to ensure that the consequences of serving on a jury do not result in an undue burden for self-employed persons or are such as to encourage them from performing this civic obligation*.

100. The second potential problem relates to the provision in paragraph 3 requiring the lawful interests of a jury to be taken into consideration unless those interests are less than the damage to justice or a third person.

101. It is, of course, appropriate to avoid putting a burden on jurors where that is not actually required for the disposal of a case. However, there is insufficient precision in the present provision as to how it is to be judged that the damage to a juror's lawful interests may or may not be greater than the damage to justice or a third person. Furthermore, it is unclear how such a provision is to relate to the more specific provisions in Article 31 as regards refusal to perform the duties of a juror and also as to whether or how it be relevant to the conduct of the proceedings once a trial gets under way.

102. *There is a need, therefore, to clarify how this provision is to be applied and, in particular, as to what it adds to the more concrete provisions in Article 31*.

Article 29

103. The provision in clause (d) of Article 29 regarding physical or mental disability for eligibility for jury service does not really indicate what will be the basis for making the assessment that someone is not able to perform the duties of a juror. In particular, it is unclear as whether this is only applicable in respect of disabilities which involve a fundamental impediment to performing jury service or it also applies to ones that might require some practical arrangements to be made (such as wheelchair access or an audio induction loop), which might be costly but are not inherently impossible..

104. A failure to ensure that disabled persons are not inherently incapable of performing jury service would amount to discriminatory treatment contrary to Protocol No. 12 and would also be incompatible with obligations under the Convention on the Rights of Persons with Disabilities[126].

105. *There is thus a need to ensure that this provision is applied in a manner compatible with Georgia's international obligations and to ensure that the courts have the necessary resources for this purpose*.

Article 30

[126] See the Views of the Committee on the Rights of Persons with Disabilities in *Lockrey v. Australia*, Communication No. 13/2013, 1 April 2016.

106. The grounds of incompatibility are more extensive than those in some Council of Europe member States but none of them could be regarded as having no rational and objective basis.

Article 31

107. Two of the grounds which this provision allows someone to refuse to perform the duties of a juror seem too imprecise, which may affect the practicality of constituting a jury or lead to possible differences in the treatment of persons in essentially the same situation.

108. Thus, the specification in sub-paragraph (c) that such a refusal may be "due to health status" does not make it clear what this involves. "Health status" is, in fact a concept that can cover persons whose health is good as much as bad. It is clearly appropriate to allow those who are seriously unwell or who are due to undergo a major operation to be excused from performing jury service but the present provision could also allow those who have health problems but are still able to work regularly or who need medical treatment that could be postponed without major consequences also to refuse to serve.

109. *There is thus a need to formulate the health ground in a manner that more clearly links health to a real inability to perform jury service*.

110. The second problematic ground is the intention to go abroad referred to in paragraph (d). This has the potential to allow people to organise their activities in a way to avoid performing their civic obligation. Furthermore, it does not make a distinction between persons with firm plans and ticket bookings, those who have trips which could be readily postponed and those who are only contemplating travel abroad. Only those in the first group would really deserve to be excused.

111. *There is thus a need also to formulate this ground in a more restrictive manner to ensure that the performance of jury service is not inappropriately evaded*.

112. A further problem in connection with this provision is that there appears to be no procedure for judging whether or not the different grounds in it are fulfilled. Certainly, the provisions on the challenge procedure in paragraphs 1-6 of Article 223 do not seem to cover it since the concept of "challenge" would seem to relate more to eligibility, incompatibility and exclusion under Articles 29, 30 and 59 respectively. Furthermore, although there is provision for "self-challenge" in Article 223.7, that provision only concerns circumstances preventing a person's fulfilment of the duties of a juror and not his or her refusal to perform them. It may be that this is nonetheless intended also to cover such refusal but the formulation of the provision is not really adequate for this purpose.

113. *There should thus be clearer provision governing the determination as to whether or not a prospective juror is entitled to refuse to perform the duties of a juror and this should be located in Article 223*.

Article 59

114. The grounds specified in this provision for exclusion from participation of jurors and others from participation in a criminal trial are generally appropriate ones. However, the meaning of the ground in sub-paragraph (d) is unclear as to what is entailed by being "members of one family, or close relatives" insofar as this is presumably not a matter of a connection to some of the participants in the trial since that is covered by sub-paragraph (c). However, the latter provision does not seem to be drawn broadly enough as being related to any judge or prosecution counsel involved in the case would be a good reason to doubt the impartiality of a juror. This situation could, of course, be caught by the catch-all provision in sub-paragraph (e).

115. *The scope of sub-paragraph (d) should thus be made clearer and the scope of sub-paragraph (c) should be extended to family members and close relatives of all participants in the trial*.

Article 62

116. This provision requires that a juror is required to disclose any circumstances that would exclude his or her participation in the court session and to do so "immediately". However, this provision does not make it clear from when this immediacy is to be determined. Is it on being summoned to the jury selection session or when he or she becomes aware of those circumstances? The latter would be more appropriate since the circumstances will not always be evident until the case gets under way and the juror learns of the witness testimony or other evidence being relied upon. Moreover, the issue of whether or not certain circumstances will necessarily exclude someone from participation in the court session is not necessarily something which the person concerned can conclusively assess since some perceived problems may be more apparent than real. Nonetheless, it would be appropriate for the court's attention to be drawn to a potential problem so that it can determine whether or not exclusion from participation is really necessary.

117. *This provision should thus be amended to provide that the disclosure obligation arises when the person concerned actually becomes aware of any circumstances that might exclude him or her from participation in the court session*.

Article 221

118. The conferment by paragraph 1 of the responsibility for compiling a list of prospective jurors on the judge – as opposed to that of conducting the selection of jurors and reserve jurors from that list - which is envisaged by this provision seems to

be imposing an administrative task on members of the judiciary that detracts from their prime role of adjudication both as regards its character and the time that it will involve.

119. *Consideration should thus be given to entrusting this particular responsibility to an administrative office working under the supervision of the relevant court*.

120. Paragraph 1 also provides that that this list "shall include not more than 300 candidates", which seems rather imprecise in at least the English text since that could mean any figure from 1 to 299. This is obviously not what is intended but there is no basis for determining what number of candidates is actually required, particularly as there does not seem any reason why 300 possible candidates could not be identified from amongst those on the unified list of citizens.

121. *A precise number of candidates should thus be a specified in this provision.*

122. The specific function of the questionnaire that is to be sent to prospective jurors that is to be "approved by the judge after consultation with the parties" is not identified in paragraph 1 or in other provisions. Given the involvement of the parties in its formulation, it might be thought to relate to issues such as incompatibility and circumstances excluding participation pursuant to Articles 30 and 59 respectively but it might also usefully address the issue of eligibility under Article 29 and whether or not there exist reasons entitling the person concerned to refuse to act as a juror.

123. However, it is to be noted that paragraph 6 provides that a prospective juror is only to inform the court about reasons for challenge within 2 days after the receipt of the court notice", i.e., after the process of completing the questionnaire has already occurred. Furthermore, there is no comparable obligation regarding eligibility and circumstances excluding participation and no indication of any possibility of indicating the existence of grounds for refusal to act as a juror.

124. In the absence of a specified function there is no basis on which a judge can determine the appropriateness of particular questions and thereby determine whether or not they should be approved. Moreover, there is no indication as to whether there are any sorts of questions that may not be asked, such as the partial prohibition regarding personal details and professional and commercial secrets found in paragraph 5 of Article 223. It may be that these details and secrets may not be relevant or necessary at this stage of the process but it ought to be clarified as to whether or not there any matters that should not be addressed in the questionnaire.

125. *There is thus a need to specify the exact function of the questionnaire that is to be completed by prospective jurors, to indicate that it is to cover eligibility and refusal to act as a juror and to identify what sort of issues, if any, may not be addressed in it. However, he most relevant issues to address would be concerned*

with: whether or not the prospective jurors know the accused or others who might be involved in the proceedings; whether or not they have any specific familiarity with circumstances relating to the alleged offence(s); whether or not they have formed a definitive view about the responsibility of the accused in respect of the alleged offence(s) and, if so, what has led to this view being reached; and whether or not there are any factors affecting their ability to serve as a juror during the expected duration of the trial? There is also a need to consider whether or not the duty to inform the court under paragraph 6 should extend beyond matters concerning incompatibility. In particular, it would be appropriate for a prospective juror to be required to specify at this point any grounds on which he or she might be entitled to refuse to act as a juror. It might be found useful for the questionnaire to draw upon the model set out in Annex 1.

126. The second and third sentences of paragraph 3 are concerned with challenging an "unlawful decision or action of the presiding judge of the jury selection trial". However, such a decision or action is more likely to be concerned with decisions or actions pursuant to Articles 222-224 than ones taken under Article 221. The location of these two sentences would, therefore, be more appropriately located after those provisions.

127. *The locations of these two sentences should thus be changed accordingly*.

128. Paragraph 4 provides for the list of those selected as prospective jurors to be sent to the parties, which is appropriate given their subsequent role in the jury selection session. The importance of this role would suggest that this requirement should be regarded as mandatory so that non-compliance with it will render invalid the jury selected except where neither party has objected to not receiving this list. However, there is no provision specifying that this would be the consequence of such non-compliance.

129. *There is thus a need to confirm that this is the correct understanding of this requirement*.

130. Paragraph 5 provides for a notice to attend the jury selection session to be sent to not more than 150 prospective jurors out of the total number of those on the list. The use of "not more than" is once again rather imprecise. The potentially high number that may be summoned is presumably based on the assumption that not all will attend[127] and that a good proportion might be subject to the incompatibility requirements, excluded from participation or entitled to refuse to serve. Actual experience with jury selection may, of course, lead to the conclusion that such a high number could be unnecessary and that the administrative burden involved in

[127] Paragraph 2 of Article 222 specifically refers to the possibility of less than 50 prospective jurors appearing at the jury selection session.

contacting so many prospective jurors could be alleviated by summoning considerably less than 150. However, there are no criteria determining the actual number to be summoned and there is the unnecessary risk that the summoning of less than 150 will be challenged as constituting an unlawful jury selection decision.

131. *There is thus a need either to specify a precise number or to indicate that the court is entitled to summon the number of prospective jurors considered appropriate in the circumstances of the particular case. Furthermore, the experience of summoning prospective jurors should be monitored so as to guide this process should the discretion to summon less than 150 be retained.*

132. Liability may be incurred by a prospective juror under paragraph 3 of Article 236 if he or she does not attend the jury selection session as is required by paragraph 5 but there is no indication in this provision as to what, if any, grounds might be relied up to provide an excuse for non-attendance – thereby avoiding such liability - and how the existence of any such excuse is to be communicated. Certainly illness or a family death, as well as apprehension by the police should be considered as legitimate excuses for non-attendance and there ought to be appropriate provision to that effect.

133. *Article 221 should thus be amended to specify either what excuses for non-attendance there may be, together with the manner in which these are to be communicated to the court, or which existing provisions can be relied upon for this purpose.*

134. This provision does not require any information about serving on a jury to be sent to prospective jurors with the questionnaire that – pursuant to paragraph 1 - they are required to complete. Sending some sort of guide to prospective jurors – covering issues such as eligibility to serve on a jury, incompatibility, circumstances excluding participation, the right not to serve, what to expect at the jury selection session, how to prepare for jury service, the trial process, the rights of jurors, a glossary of terms used in the trial process that might be helpful and how their social guarantees are to be obtained – would help them understand what is expected of them and thereby make them better equipped to undertake jury service or, if appropriate, to indicate why they should not be expected to serve as a juror in the particular case for which they have been summoned. The text of the guide used in Scotland is annexed to the Report for illustrative purposes[128] but any guide provided to prospective jurors in Georgia would need to take account of the rules and practices followed there.

135. *Consideration should thus be given to preparing a guide for prospective jurors to be sent to them with the questionnaire to be completed at the beginning of the jury selection process.*

[128] In Annex 2. The more reader-friendly version used is available at: http://www.scotcourts.gov.uk/docs/scs---court-users/guide_to_jury_service_in_the_high_court_and_sheriff_court.pdf?sfvrsn=2. N.B. this guide covers service on juries in civil as well as criminal cases.

Article 222

136. The authorisation in paragraph 2 to start the jury selection process "even if less than 50 prospective jurors appear" is problematic in that this formulation is again imprecise since it could mean any number between 1 and 49. The former number would render the process pointless and anything less 30 would be the minimum needed in those cases where the charges involved stipulate life imprisonment and so at least 20 peremptory challenges could be made under paragraph 10 of Article 223.

137. *There is thus a need to be more specific in this provision as to the minimum number of prospective jurors that would be required in order for a jury selection session to proceed. A requirement of at least 50 would seem necessary for the selection process to have some chance of having a successful outcome and should be so specified.*

138. Paragraphs 3(d) and 4 both provide for the prospective jurors to be informed about the applicable law to be used during the case hearing, with the latter adding that the instruction concerning this is to be prepared with the participation of the parties.

139. Such a requirement does not seem necessary or appropriate at this stage of the proceedings as the purpose of the jury selection process is limited to the selection of jurors and reserve jurors and should not be entering into the substance of the trial process. Moreover, it would be more relevant for the issue of instructions to the jury about the applicable law to be used during the case hearing to be addressed once this has actually been selected and this is dealt with in Article 231.

140. *The retention of paragraphs 3(d) and 4 is thus unnecessary and they should be deleted.*

141. However, there is no specific indication that the presiding judge should address prospective jurors as to the requirements concerning eligibility, incompatibility, circumstances excluding participation and the right to refuse to act as a juror. This is unfortunate as making these requirements clearer during the jury selection session could lead to any problems regarding the first three issues being resolved at any early stage and could also ensure that unjustified claims to refuse to act are not made or pursued.

142. *Paragraph 3 should thus require the presiding judge to address prospective jurors on these four issues.*

Article 223

143. The arrangements in this provision regarding challenge and self-challenge of prospective jurors are, as has already been noted, somewhat unsatisfactory in that these concepts might cover eligibility, incompatibility and circumstances excluding

participation pursuant to Articles 29, 30 and 59 but this is not definite in view of the formulation used. Moreover, these two concepts are quite inappropriate to deal with the refusal to act as a juror.

144. *There is thus a need to specify that "challenge" and "self-challenge" is concerned with Articles 29, 30 and 59. Furthermore, there is a need to introduce a provision that deals specifically with the validity of any claim be a prospective juror that he or she is entitled to refuse to act as a juror.*

145. Although the possibility of a peremptory challenge to prospective jurors is a feature of many criminal justice systems using juries, it should be noted that this possibility was abolished in England on account of this being incompatible with the notion of random selection of jurors, the fundamental importance of which has been emphasised by the European Court. Moreover, the need for it is questionable given the provision for both asking prospective jurors to complete a questionnaire and questioning them in the jury selection session. Furthermore, the ability to make peremptory challenges means that it is not possible to prevent selection being to some extent based on the grounds supposedly prohibited in paragraph 6.

146. *Consideration should thus be given to the need to retain peremptory challenges in the light of experience regarding their use following the first two years' operation of the wider use of jury trials.*

147. Paragraph 9 provides for an adjournment of no more than 10 days for the purpose of inviting other prospective jurors where those first summoned have proved insufficient on account of challenges to select "all jurors" or "the number of prospective jurors on the list is less than 14". In the first situation those summoned will the remainder of those on the initial batch of "no more than 300 candidates" whereas the latter situation concerns the possibility that a jury cannot be constituted from even them and so a further 100 candidates have to be identified.

148. An adjournment of 10 days might, when taken with the notice effected through being sent the questionnaire envisaged in paragraph 1 of Article 221, be enough to allow those concerned to rearrange valid commitments such as hospital appointments or to seek a determination as to whether they have the right to refuse to act as a juror. However, such an adjournment would not really allow for compliance with the provisions on the prospective jurors sending and returning the questionnaire and the responses being forwarded to the parties. This is because it does not take account of the need for at least a day to elapse between the questionnaire being sent to and received by the prospective jurors and at least another day between them returning it to and being received by the judge before he or she forwards it to the parties within 5 days of its receipt. In the circumstances, a minimum adjournment of 12 days seems necessary and, in practice, only a longer one is likely to be sufficient for the purpose of this process.

149. *The period prescribed for an adjournment where a further 100 candidates have to be summoned should thus be modified to reflect the practicalities involved*.

Article 224

150. Paragraph 2 stipulates that a reserve juror "shall not … attends court deliberation" except where he or she has replaced some other juror. Such an exception to the prohibition on participation in court deliberation would generally be appropriate. However, there would be no justification for it being applied – as paragraph 4 of Article 256 envisages - where a juror becomes unable to fulfil his or her duty after having begun to take part in deliberations, notwithstanding that this is not something specifically addressed in the provisions in Article 232 on replacing a juror with a substitute juror.

151. Certainly, such a replacement where a juror's inability to fulfil his or her duty arises from the emergence of a reason of incompatibility or of circumstances excluding participation would not be regarded by the European Court as sufficient to allay concerns of the defendant (s) about that juror's participation in proceedings even if accompanied by certain directions or guidance that might additionally be given to the jurors by the judge[129]. However, even if the reason for needing a replacement was for reasons unconnected with a lack of impartiality – such as death or illness – it seems unlikely that the participation of a reserve juror in reaching a verdict in a case after the deliberations had already got under way could hardly be regarded as consistent with the right to a fair trial. This would be all the more so in view of the significant time constraints imposed on this process by Article 261, which could be seen as precluding any significant involvement by the reserve juror[130].

152. *This potential problem should thus be avoided by an amendment to Article 232 that precludes the appointment of a reserve juror once a jury's deliberations have begun and the deletion of the provision for replacing a juror during deliberations that is found in paragraph 4 of Article 256.*

153. There is nothing in this or any other provision that requires the presiding judge to explain to the reserve jurors what is the nature of their role.

154. *It would thus be appropriate for the presiding judge to be required to instruct the reserve jurors that they will be called upon to act should it become impossible for one or more of the jurors to continue to serve on the jury.*

Article 226

[129] See para. 35 above.
[130] This issue has not been so far been considered addressed by the European Court but a comparable situation was addressed in its ruling in *Cerovšek and Božičnik v. Slovenia*, no. 68939/12, 7 March 2017, which is examined in fn. 82.

155. The stipulation in paragraph 3 that the "composition of the jury shall ensure its independence and impartiality" is entirely appropriate. However, the location of this statement would be more appropriate at the beginning of Article 223.

156. *This paragraph should thus be re-located accordingly.*

Article 231

157. The content of this provision is not generally problematic but, as will be seen in the following section, the manner in which the particular requirements set out in it for instructing jurors has been elaborated does require further attention.

158. However, the reference in paragraph 3 to the presiding judge providing jurors with information as to the procedure for assessing all pieces of evidence only "briefly" seems inapt insofar as it concerns instructions to be given before a jury retires to deliberate on its verdict. This is because such evaluation may not only be a complex matter in the sort of cases that will be tried by a jury but its use in this context does not match the importance of this aspect of giving instructions to the jury.

159. *The application of the word "briefly" in paragraph 3 should thus be limited to the giving of preliminary instructions to jurors.*

Article 232

160. The stipulations regarding the replacement by a juror with a reserve juror are generally appropriate. However, as already noted[131], there is a need to preclude the making of any such replacement once the jury has commenced its deliberations.

161. *Such a restriction on replacement should thus be inserted into this provision.*

162. In addition, this provision fails to take account of the possibility that, where there is a need to replace a juror on account of grounds for his or her challenge having been revealed or because he or she has violated the requirements of the Criminal Procedure Code of Georgia, the relevant failing may have resulted in a risk that this led to the other members of the jury becoming prejudiced, which either might be capable of being satisfactorily addressed by the presiding judge giving them specific directions or would require – where the circumstances suggest that these would not be sufficient – the entire jury to be discharged and a new one to be constituted[132].

163. *There should thus be the addition to this provision of an express requirement for the presiding judge to advert to such a risk and to respond to it accordingly.*

164. Furthermore, there is a need for some provision that enables the presiding judge to carry out an inquiry as to whether there is actually a basis for concluding that

[131] See paras. 151-152 above.
[132] See paras. 34-35 above.

grounds for a juror's challenge actually exist or that a violation by a juror of the requirements of the Criminal Procedure Code of Georgia has actually occurred[133].

165. *Such a power should thus be introduced into this provision.*

Article 233

166. The stipulation that the initial appointment of the jury foreperson, as well as of any subsequent replacement, through the drawing of lots is not inappropriate. However, paragraph 3 refers to the need for a replacement "if the jury foreperson is dismissed" without indicating how such dismissal is to occur and the relevant grounds on which this should be based. Moreover, the reference to being "dismissed" does not seem to take account of the possibility of the jury foreperson chosen by lots wishing to stand down from this position and whether or not this would even be possible.

167. *There is thus a need to clarify what the notion of being "dismissed" covers and, if necessary, to introduce the possibility of a jury foreperson being able to resign. Furthermore, the grounds on which any dismissal can occur should be specified in this provision.*

Article 234

168. The terms of the oath to be taken by jurors seems to embody a contradiction in that it refers to the need to "take into consideration all lawful evidence" but at the same time suggests that the decision should be made on the juror's "inner belief as befits a fair person". The latter opens up the possibility that the decision will be based upon the juror's beliefs as to what is the right outcome rather than being directed only by the evidence and the applicable law.

169. *It would thus be appropriate to reformulate the law to provide that each jurors swears to fulfil the duty honestly and impartially and to determine the case on the basis of only the lawful evidence and the applicable law.*

170. Furthermore, it does not seem sufficient that each juror merely "affirms" in response to the reading out of the oath by the presiding judge. The individual responsibility of all the jurors would be underlined more if each juror and reserve juror actually had personally to take the full oath.

171. *Consideration should thus be given to requiring each juror and reserve juror to give the oath in full.*

Article 236

172. The duties of jurors that are prescribed in this provision are generally suitable. However, insofar as it is not a matter of translation, it would be more appropriate if

[133] *Ibid.*

the prohibition in sub-paragraph 1(d) referred to "seeking" rather than "obtaining" information related to the case outside of the trial as the latter could be involuntary.

173. *Insofar as this is necessary, sub-paragraph 1(d) should be amended accordingly.*

174. The use of mobile phones, particularly those providing access to the internet, provide the possibility of seeking information about a case that has not been presented in the trial. In addition, such phones can be a source of distraction during the proceedings and also provide an opportunity for one or more persons to seek to threaten or to otherwise exercise improper influence over jurors.

175. *Consideration should thus be given to the addition of a duty for jurors to surrender their mobile phones while they are taking part in the proceedings.*

176. The list of duties do not include any requirement for a juror or reserve juror to inform the presiding judge of any attempt by one or more persons to threaten them or otherwise exercise any improper influence over them, as well as about a possible breach by another juror of either the requirement to act impartially or of the other duties set out in this provision. Without the presiding judge being so informed it is unlikely that some problems that might affect the proper functioning of the jury will be brought to his or her attention. Such duty is found in the second sentence of paragraph 4 of Article 256 but it would be more appropriate for it to be included with the list of a juror's other duties so that the presiding judge draws the attention of jurors to all their duties when, as required by paragraph 4 of the present provision, warning them of the applicable penalties.

177. *Such a duty should thus be moved from the second sentence of paragraph 4 of Article 256 and included in paragraph 1.*

Article 237

178. The duty to inform jurors about the existence of a plea bargain "on issues that are essentially related to the case under consideration" is entirely appropriate. However, it is important that this duty is understood to extend not only to such a bargain involving any of the defendants in the case but also to ones concluded by any witnesses where the plea bargain concerned involved an undertaking to testify in the case under consideration[134].

[134] See *Navalnyy and Ofitserov v. Russia*, no. 46632/14, 23 February 2016, in which the European Court stated that "the separation of the cases, particularly X's conviction with the use of plea-bargaining and accelerated proceedings, compromised his competence as a witness in the applicants' case. As noted above, his conviction was based on the version of events formulated by the prosecution and the accused in the plea-bargaining process, and it was not required that that account be verified or corroborated by other evidence. Standing later as a witness, X was compelled to repeat his statements made as an accused during plea-bargaining. Indeed, if during the applicants' trial X's earlier statement had been exposed as false, the judgment issued on the basis of his plea-bargaining agreement could have been reversed, thus depriving him of the negotiated reduction of his sentence. Moreover, by allowing X's earlier statements to be read out at the trial before the defence could cross-

179. *It would thus be appropriate to modify the formulation this provision to ensure that there is no doubt that it expressly covers plea bargains involving witnesses as well as defendants.*

Article 256

180. As already noted[135], the duty prescribed in the second sentence of paragraph 4 would be more appropriately located in the list of duties for jurors in paragraph 1 of Article 236.

181. *The second sentence of paragraph 4 of Article 256 should thus be re-located in paragraph 1 of Article 236.*

182. Also as already noted[136], it is inappropriate for paragraph 4 to include the possibility of a reserve juror joining the deliberations of a jury that have already commenced. Furthermore, it is improbable that the proposed warning to a juror who has demonstrated "clear bias" or has otherwise clearly violated the law would be regarded by the European Court as sufficient to allay concerns as to a lack of impartiality in the functioning of a jury[137].

183. A more appropriate course of action than that proposed in paragraph 4 would be for the presiding judge to remove the juror concerned and to determine whether or not the remaining jurors might have been influenced by the conduct of the juror who has been removed. If there is a sound basis for concluding that there has been no such influence – and the fact that the presiding judge has been informed by them about the conduct of this juror would be supporting evidence in this regard – then it would be possible for the deliberations to continue so long the minimum number of jurors remain. If such a conclusion cannot be reached or if the required minimum number of jurors do not remain following the removal of the juror concerned then the entire panel of jurors should be dismissed and a new jury should be constituted.

184. *The third, fourth and fifth sentences of paragraph 4 should thus be replaced by ones that give effect to the procedure suggested in the preceding paragraph.*

Article 257

185. The possibility for providing additional clarifications to jurors made by this provision is generally appropriate. However, the stipulation in its last sentence that the ability of a juror to make such a request may be restricted by the presiding judge upon

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examine him as a witness, the court could give an independent observer the impression that it had encouraged the witness to maintain a particular version of events. Everything above confirms the applicants' argument that the procedure in which evidence had been obtained from X and used in their trial had been suggestive of manipulation incompatible with the notion of a fair hearing" (para. 109).

[135] See paras. 176-177 above.

[136] See paras. 151-152 above.

[137] See fn. 48.

a motion of a party is deficient in that it provides no criteria governing any decision to accede to such a motion. A restriction on submitting requests might, e.g., be possibly justified where a particular juror has previously asked a succession of frivolous or clearly irrelevant questions but, in the absence of such or comparable criteria, decision-making in this regard could be arbitrary and frustrate the ability of a jury to reach its verdict in a case.

186. *Some criteria for the decision to restrict the submission of requests by a juror should thus be introduced into this provision.*

Article 261

187. There is an element of duplication in the first and second sentences of paragraph 1, with the second sentence providing a more accurate statement of the approach required of a jury in reaching its verdict.

188. *The first sentence of paragraph 1 should thus be deleted.*

189. The time periods specified in paragraphs 4 and 6, if taken literally could entail deliberations running for a continuous period of 15 hours or more, which may or may not follow several hours hearing evidence, closing submissions and instructions by the presiding judge. No provision is made for breaks, meals or sleep during this period and the possibility of fatigue or impatience may lead to a willingness to reach a verdict that does reflect the evidence, particularly given the relatively low number of jurors required by paragraph 4 in order for majority verdicts to be returned. This may result in particular cases a finding that the manner in which the deliberations were conducted rendered the trial unfair[138].

190. *It should thus be ensured in practice that the continuation of deliberations does not occur in a manner that could undermine the fairness of the approach to reaching a verdict. It is not, however, absolutely necessary that this be specifically addressed in this provision.*

[138] Cf. the view of the European Court in *Makhfi v. France*, no. 59335/00, 19 October 2004 that it was essential that not only those charged with a criminal offence but also their counsel should be able to follow the proceedings, answer questions and make their submissions without suffering from excessive tiredness and that, similarly, that judges and jurors should be in full control of their faculties of concentration and attention in order to follow the proceedings and to be able to give an informed judgment. In this case the trial had begun at 9.15 a.m. on 3 December 1998 at 9.15 a.m. and ended at 8.30 a.m. on 5 December 1998. After the second day of the trial had ended at 12.30 a.m., counsel for the defendant had applied unsuccessfully for an adjournment. The proceedings had then resumed at 1 a.m. and had lasted until 4 a.m. Counsel for the defendant had given his address when the hearing resumed at 4.25 a.m., by which time the sitting had lasted for a total of 15 hours and 45 minutes. The judge and jury, who held their deliberations between 6.15 and 8.15 a.m. on 5 December, found the applicant guilty and sentenced him to eight years' imprisonment. The European Court found that the rights of the defence and the principle of equality of arms had not been observed, contrary to Article 6(3) taken together with Article 6(1).

191. However, regardless of the lack of provision for breaks, meals or sleep, the relatively low number of jurors required to support majority verdicts that is provided for in paragraph 4 – 8 out of 11 jurors, 7 out of 10, 6 out of 9, 5 out of 8 and 4 out of 7 or 6 – is considerably at variance with practice in most other countries where majority verdicts are possible[139]. The exception is Scotland where it is possible to have a verdict which is supported by 8 out of the 15 jurors but this is a country where the jury system is longstanding and well-understood by the population. It cannot be suggested that the possible majorities authorised in paragraph 4 are necessarily inconsistent with European standards and the European Court does not appear to have commented on the fairness of convictions in which these are based on such verdicts[140]. Nonetheless, it could well be that the number of jurors required for a majority verdict in particular cases could, when taken with other considerations such as doubts as to whether a risk of impartiality has been adequately addressed, lead to the conviction being secured in breach of the requirement to a fair trial, as required by Article 6(1). Furthermore, as already noted[141], such majority verdicts could undermine public confidence in the jury system.

192. *Consideration should thus be given to increasing the number of supporting jurors required for the return of a majority verdict where a unanimous verdict is not possible.*

Article 265

193. It is appropriate for it to be provide in paragraph 3 that the presiding judge shall not provide grounds for the verdict as that is a matter for the jury's determination. However, this underlines the importance of the instructions given by the presiding judge to the jury for the purpose of complying with the requirement under Article 6(1) of the European Convention that the accused and the public should be able to understand the verdict that has been given[142].

B. Criminal Code of Georgia

Article 367[1]

194. The imposition of liability for breach of confidentiality of jury deliberation and ballot in this provision gives effect to a safeguard recognised by the European Court for the effective discharge of the role played by juries in the criminal justice system[143]. However, the formulation of this provision leaves it unclear as to whether it

[139] E.g., 1 out of 12 in New Zealand, 2 out of 10 in England and Wales and Oregon and Louisiana in the United States.
[140] There appear to have only been three such cases in which such verdicts are mentioned in the facts: *Mellors v. United Kingdom*, no. 57836/00, 17 July 2003, *Al-Khawaja and Tahery v. United Kingdom* [GC], no. 26766/05, 15 December 2011 and *Beggs v. United Kingdom*, no. 25233/06, 6 November 2012.
[141] See para. 91 above.
[142] See paras. 61-78 above.
[143] See para. 39 above.

is only concerned with a breach by jurors of such confidentiality or would also cover the publication of information about the deliberation and ballot received from a jury member. The imposition of liability in the latter case would not necessarily be incompatible with the right to freedom of expression under Article 10 of the European Convention and the fact that it exists could actually be necessary to prevent publications which would undermine the functioning of juries.

195. *There is thus a need to clarify the scope of this offence and, insofar as this is not already the case, to extend it to the publication of information received in breach of confidentiality of jury deliberation and ballot.*

Article 367[2]

196. This provision imposes liability on a prospective juror or a juror who fails to submit to the court information with regard to his or her "incompatibility" or who submits intentionally incorrect information regarding this. Such an offence is entirely appropriate. However, there is no such liability for a similar failure or submission in respect of eligibility to act as a jurors, the non-disclosure of circumstances excluding participation in a jury or the refusal to act as a juror, which would be necessary as a safeguard in connection with ensuring a fair trial.

197. *There is thus a need to make provision for imposing liability on those who fail to provide such information or who provide such information that is intentionally incorrect*.

C. Conclusion

198. Many of the changes that have been indicated as necessary in the two Codes relate to making their scope more specific or their effect clearer. However, there are also certain substantive matters that need to be addressed, notably as regards the extent of the majority where verdicts are not unanimous, the conduct of the jury selection session, the production of a guide for prospective jurors, the use of reserve jurors and the need to consider whether a fair trial is still possible with an existing jury after it has become necessary to remove one juror.

199. In addition, it is noted that there are no special provisions enabling a court to restrain media coverage that has the potential to prejudice the conduct of a trial involving a jury. Although any restrictions imposed must always be consistent with the requirements of the right to freedom of expression under Article 10 of the European Convention, courts still ought to have some power to restrain such coverage where the risk of prejudice cannot be addressed by other means.

200. *There is thus a need to clarify how, if at all, this problem can be addressed and, insofar as it cannot, to adopt appropriate amendments to the Criminal Procedure Code of Georgia for this purpose.*

5. Jury Instructions

A. Introduction

201. Article 231 of the Criminal Procedure Code of Georgia requires the presiding judge in a jury trial to instruct the jury on the applicable law, both upon the opening of the court session and before it retires to the deliberation. These instructions are to be given to the jury in writing.

202. The giving of some form of such instructions to the jury, as has also already been noted[144], has been considered by the European Court - when taken with addresses by the prosecution and the defence - to fulfil the need under Article 6(1) of the European Convention for the accused and the public to understand any verdict that has been given.

203. The model for the instructions that are intended to meet this requirement is currently found in the *Jury Instructions*, which is comprised of three parts: the Chairman's Preliminary Instructions to the Jury; The Rights of the Jurors; and Final Instructions. A draft of the specific instructions that are to be given to the jury in a particular trial will be prepared by the presiding judge and finalised by him or her after determining any motion submitted by the parties for making amendments and additions to them.

204. This section of the Report considers the extent to which the existing model for the instructions is sufficient to fulfil the obligation under Article 6(1) and makes certain suggestions – which are italicised - as to how compliance with the requirements of this provision might be better achieved[145].

205. The following discussion addresses all three parts of the existing model of instructions but deals with the part concerning the rights of jurors under both the preliminary and final instructions. It also makes some suggestions regarding instructions that may be necessary in the course of the trial. This discussion is based on an unofficial translation of them.

[144] See para. 62 above.

[145] Some of the suggestions draw upon the text of *The Crown Court Compendium Part 1: Jury and Trial Management and Summing Up*, which has been published by the Judicial College of England and Wales and in which illustrative examples can be found. This publication is available at: https://www.judiciary.gov.uk/wp-content/uploads/2016/06/crown-court-compendium-pt1-jury-and-trial-management-and-summing-up-feb2017.pdf.

206. Before entering into this discussion, it is recalled that it has already been suggested[146] that it would be desirable for prospective jurors to be provided with a guide to serving on a jury at the same time that they are sent to the questionnaire to be completed at the beginning of the jury selection process as such a guide would help them understand what is expected of them and thereby make them better equipped to undertake jury service or, if appropriate, to indicate why they should not be expected to serve as a juror in the particular case for which they have been summoned. The suggestions that are made for revising the existing model of instructions are based on the assumption that such a guide has been sent to prospective jurors.

207. The following discussion is also based on the assumption that the suggestion previously made[147] that the presiding judge should address prospective jurors as to the requirements concerning eligibility, incompatibility, circumstances excluding participation and the right to refuse to act as a juror has been implemented.

B. Preliminary Instructions

208. The opening paragraph sets out what is to be addressed and indicates the nature of the instructions that will be provided before the jury begins its deliberation at the end of the hearings. This is entirely appropriate.

209. This is followed by a summary of the events constituting the alleged offences and an explanation of the relevant legal provisions.

210. *However, before dealing with the relevant legal provisions and the different elements of the offences charged, it would be important first to remind the jurors of the requirements relating to incompatibility and the circumstances that would exclude their participation in the case. Thereafter, they should be given information as to how the trial will be conducted and be reminded of both their responsibilities and rights as this ought to inform their consideration of the relevant legal provisions in the case.*

211. In regard to incompatibility and exclusion from participation, it would be desirable to take steps to ensure that none of the jurors has any connection with the accused or anyone else involved in the proceedings.

212. *Thus, it would be appropriate for the presiding judge to emphasise the importance of none of the jurors having any personal connection with those involved in the case and so:*

[146] See paras. 134-135
[147] See paras. 141-142 above.

(a) tell them the name of the accused and ask them to look at him or her to ensure that no one knows him personally, allowing them time for this and ensuring that they can all actually see him or her;
(b) tell them that they are about to hear a list of names of all potential witnesses and any other person connected with the case including, in the case of police or expert witnesses, their occupations, and ask the panel whether any of them knows anyone on the list;
(c) ask the prosecution advocate to read the list of prosecution and defence witnesses already agreed by the lawyers concerned;
(d) ask the panel if any of them recognise any of the names which have been given;
(e) explain that if, at any later stage of the case, a juror recognises someone connected to the case, e.g., a witness, notwithstanding that he or she did not recognise a name at this stage, he or she should make this known straightaway; and
(f) ask if any of the jurors has any connection with any place, business or organisation connected with the alleged offence(s).

213. *It would not, however, be necessary for points (b), (c), (d) and (f) to be covered if these have already been dealt with in either the questionnaire sent under Article 221 of the Criminal Procedure Code of Georgia or in the jury selection session itself. Where any juror gives an affirmative answer to any of these questions, it would then be appropriate to seek the relevant details from him or her but this should be done in the absence of the other jurors to avoid the possibility of these leading to them becoming prejudiced. If a juror is uncertain as to whether or not he or she knows a witness or persons other than the accused who are connected to the case, it will be necessary to take steps to establish whether or not he or she does actually know the witness or persons concerned.*

214. The outcome of this process may necessitate the replacement of one or more jurors pursuant to Article 232 of the Criminal Procedure Code of Georgia.

215. *Where this occurs, care should be taken to avoid doing so in a manner that either embarrasses the juror concerned or might affect the impartiality of the remaining jurors.*

216. It will be necessary to make sure that the jurors fully appreciate their responsibilities, as much as their rights, from the very outset of the trial as otherwise their conduct could lead to the fairness of the trial being jeopardised and the risk of needing to start the proceedings. This would require some elaboration of the points set out on page 5 of the *Jury Instructions*, which – apart from the specification of the penalties that can be imposed – actually says no more than is found in Articles 235 and 236 of the Criminal Procedure Code of Georgia. These provisions should, in any

event, have already been provided to the jurors at the time of their being summoned to the jury selection session[148].

217. *The presiding judge should thus emphasise the importance of the jurors:*

- *trying the case only on the evidence and remaining faithful to their oath;*
- *informing the presiding judge if he or she is not able to hear any of the evidence, with an explanation as to how they can communicate with him or her;*
- *not leaving the courtroom during the hearing without permission with an indication as to how this is to be sought;*
- *not undertaking any internet or other searches for material related to the case or the parties;*
- *not discussing any aspect of the case with persons other than their fellow jurors and not allowing anyone else to talk to them about it, whether directly, by telephone, email or social media;*
- *not taking into account any media reports about the case;*
- *ensuring that their fellow jurors respect their oath and discharge their responsibilities;*
- *promptly bringing any concerns about the conduct of fellow jurors, as well as any improper attempt to influence them, to the attention of the presiding judge with an explanation as to how they are to do this;*
- *and not disrupting the proceedings or disobeying the instructions of the presiding judge.*

In addition, as set out on page 5 of the Jury Instructions, the jurors should be reminded of the relevant penalties and their liability to be replaced for breach of their obligations.

In terms of the rights of jurors, it might be better if the presiding judge told them that he or she would shortly be giving them some information about the factual circumstances of the case and the law applicable to them and that he would give them further details about both during the course of the trial and before they retire to consider their verdict. In addition, he or she should make it clear that they are entitled to make notes during the proceedings and that they will have available to them the court record of those proceedings.

218. Furthermore, it will be particularly important for the jurors to understand the role of the presiding judge in the conduct of the case.

219. *The presiding judge should thus advise the jurors that his or her responsibility is to ensure that the trial is conducted fairly, to rule on any legal arguments that might arise and to give them final instructions before they deliberate as to their verdict. In addition, the presiding judge should explain that, as he or she has sole*

[148] See paras. 134-135 above.

responsibility for legal decisions, there may be occasions when there will be a need for him or her to hear and rule on legal arguments in their absence.

220. However, it will also be important for the jurors to be given the time of the hearings and of any breaks, to be reminded of the different stages and to be advised, insofar as possible, as to the estimated length of the trial.

221. *The jurors should thus be provided with this information.*

222. It will also be appropriate to provide jurors with various other practical information, namely, as to whether they should sit in the same place throughout the proceedings, how to ask the presiding judge a question, whether it is possible to request a break and the role of any interpreter taking part in the proceedings.

223. *The jurors should thus also be provided with this information.*

224. Article 231 of the Criminal Procedure Code of Georgia requires that the presiding judge shall instruct the jury as to the applicable law at the opening of the court session and the level of detail in the example on page 2 and the first line of page-3 of the Jury Instruction should certainly be sufficient for the jurors to able to follow the proceedings. However, the text there does not really address any defences that might be relevant to the offences. Thus, although it refers to illicit keeping of fire-arms and ammunition as a keeping of them "by a person who has no legal right to do so", there is no indication of what might constitute such a "legal right". The failure to outline what might constitute a potential defence could create an unnecessary handicap for the defence.

225. *It will thus be important to develop model outlines for all the offences for which jury trial is possible and to include in them any relevant defences. It would also be desirable to monitor the actual use made of them in particular trials so that there can be some fine-tuning of the suitability of these models in the light of the experience gained in drawing upon them the course of actual proceedings.*

226. From the second line on page 3 to the end of the first two paragraphs of page 4, the *Jury Instructions* deal with, in this order, the examination of witnesses, the approach to the evaluation of evidence (including the standard of proof) and the presumption of innocence and the burden of proof. However, the understanding of the first two issues might be better appreciated after the latter two have been dealt with.

227. *The last part of the preliminary instructions should thus deal with the issues covered in pages 3-4 in the following order: the presumption of innocence and the burden of proof; the examination of witnesses; and the evaluation of evidence (including the standard of proof).*

228. The explanation of the presumption of innocence and the burden of proof is generally appropriate but it does not address those situations in which the evidential burden of raising a defence (such as an alibi or self-defence).

229. *It would thus be appropriate to make reference to those situations in which there are issues which must be proved by the accused.*

230. The account of the examination of witnesses and the approach to the evaluation of evidence (including the standard of proof) is also generally appropriate. However, while it is correct to state in the penultimate paragraph that guilt beyond a reasonable doubt "does not imply exclusion of all possible doubts", it might be added that those doubts should not be realistic. Furthermore, there is a need to clarify what standard of proof is applicable where the accused has the burden of proving an issue. If this is only necessary to the civil standard – as is often the case – then it would need to be made clear that the accused is required to show that the particular issue is only more probable than not so that he or she does not have to go so far as to make the jury sure that this was so.

231. *There is thus a need to supplement this aspect of the preliminary instructions in order to address the issues discussed in the preceding paragraph.*

232. In those cases where there are two or more offences alleged to have been committed by the accused (as in the model used in the *Jury Instructions*) and there is more than one accused, it would be appropriate to make it clear to the jury that a separate verdict must be returned in respect of each charge and that it is necessary to consider separately the evidence in respect of each charge and against each of the accused. Furthermore, it would be appropriate to make it clear that the jury's verdicts do not have to be the same for all charges or in respect of every accused.

233. *This aspect of the preliminary instructions should thus be supplemented accordingly.*

234. The last three paragraphs of the preliminary instructions on page 4 provide an appropriate conclusion to them, with its rehearsal of the essential elements of the task and responsibilities of the jury.

C. During the Trial

235. In certain cases, there may be a need for a witness to give evidence from behind a screen, through a video-link or through a pre-recorded interview and even to do so anonymously. The use of such procedures runs the risk of the jurors drawing unfavourable conclusions about the accused, which could improperly influence the verdict that they reach in the case.

236. *It will thus be necessary in such cases to explain to the jurors the importance of them appreciating that the giving of evidence in this way should not be seen as a reflection on the accused, that it should not affect their judgment of either him or her or of the witness concerned and that the disadvantage to an accused where testimony is given anonymously will need to be taken into consideration when assessing the extent to which it can be relied upon.*

237. The consideration of the evidence in a case may also require that a particular place, whether one where the alleged offence occurred or some other, needs to be visited. In such circumstances, the jury should be given instructions beforehand as to how such a visit is to be conducted.

238. *The presiding judge should thus inform the jurors as to the arrangements made for this visit. In particular, they should be told: what to look at when at the place concerned; not to discuss the case while there or travelling to it; not to speak to anyone other than the accompanying court officials or to talk at all at the place concerned; to pose any questions in writing; not to use any mobile phones or other electronic devices while there or travelling to it; and to stay together in one group and in a place where they can hear everything that is said.*

239. In the course of the trial, it may become apparent that a juror is either unable to continue act as a juror (e.g., on account of illness or a pressing family problem) or should not be allowed to do so (e.g., where grounds of incompatibility or for exclusion from participation have been discovered or for breach of the duties of jurors). In such a case, the juror being replaced will still remain under an obligation to fulfil the duties of jurors set out in Article 236 of the Criminal Procedure Code of Georgia and the remaining jurors will be wondering what has happened.

240. *The presiding judge should thus remind the juror being replaced that he or she is bound to fulfil those duties and, in particular, must not discuss the case with anyone, including family and friends, until the trial has concluded. In addition, the presiding judge should explain the reasons for the absence of the juror concerned and, if applicable, the fact that one of the reserve jurors has been appointed in his or her place. Where the replacement of a juror is on account of his impartiality having been called into question – whether on account of a connection with one of the parties or some conduct on his or her part during the proceedings – the presiding judge will need to remind the jurors who continue to serve of their duty to take into account only the evidence that they have heard in the course of the trial. It will also be appropriate to thank a juror who has had to be replaced for reasons unconnected with his or her impartiality being called into question.*

241. In certain cases there is a risk that the media coverage during the case may give rise to the risk of causing prejudice to the accused, such as by disclosing material

which is not admissible as evidence in the particular proceedings or by inflaming emotions in such a way that those hearing, reading or seeing the item(s) concerned may affect the manner in which the character or conduct of the accused is appraised, regardless of the evidence adduced in the course of the trial.

242. *In such cases, the presiding judge should thus address the jurors and underline once again the importance of them deciding the case by reference only to what they have heard during the course of the trial. The presiding judge should emphasise that the jurors must ignore anything that they have heard, read or seen about the case in any form of media. I addition, the presiding judge should endeavour to establish whether or not the jurors have been affected by what they have heard, read or seen and whether or not they are confident that they can reach a verdict by reference to only what they have heard and seen in the course of the proceedings*.

243. When dealing with situations in which it has become apparent that a juror should not be allowed to do so (e.g., where grounds of incompatibility or for exclusion from participation have been discovered or for breach of the duties of jurors), the presiding judge must consider whether or not any legitimate concern about the possible influence of this juror on the other jurors can be satisfactorily allayed by his or her removal. Similarly, the presiding judge will need to consider whether or not any legitimate concerns about the possible effect of media coverage of the trial can be satisfactorily allayed by the giving of instructions to the jurors to disregard that coverage.

244. *Insofar as it is considered that the concerns referred cannot be so satisfactorily allayed, there would thus be a need to discharge the jury and to arrange for the case to be tried by another jury. In that event, the presiding judge should tell the jurors that certain events have made it impossible for the trial to continue and that the case will have to be tried before another jury. In addition, the presiding judge should explain that it is not possible to discuss these events further in order to ensure that the new trial is unaffected by them and he or she should thank the jurors for their work on the case*.

E. Final Instructions

245. The final instructions set out the offences regarding which the guilt of the accused is to be determined and the elements required to constitute those offences, as well as the considerations that would change one matter alleged from premeditated murder to murder committed under sudden, extreme emotional excitement. In addition, there is a reminder as to the approach required for the evaluation of the evidence and the burden of proof and the various responsibilities of jurors and an explanation as to the form of the verdict. The way in which these issues are addressed is not inappropriate but, undoubtedly influenced by the requirement to be brief in

Article 231 of the Criminal Procedure of Georgia, the matters requiring attention are not sufficiently addressed.

246. Thus, these instructions do not give any indication as to what evidence has been adduced by the prosecution as to the particular elements of each offence being fulfilled – including what facts might demonstrate that there was the necessary intent for premeditated murder or allow this to be inferred - and how the defence would dispute that that is the case with some or all. Yet this something that is crucial for the determination of any criminal charge.

247. Furthermore, while the issue of possible mitigation of one offence – premeditated murder - is discussed, there is no indication as to the basis on which the sudden, extreme emotional excitement is considered to be established in the circumstances of this case nor any consideration as to what defences might exist for the other offences alleged to have been committed and the evidential basis for them.

248. As a result, in the case used in this model it would not really be possible to identify why the jurors would have reached any "Guilty" verdicts in respect of the offences charged, as is required under Article 6(1) of the European Convention.

249. *There is thus a need to introduce into the model of instructions a discussion of the evidence that might support or negate the existence of liability for the different offences. Furthermore, for each offence, it would be appropriate to itemise each of the elements involved and ask the jurors whether they are satisfied that each of them have been fulfilled, indicating that only if they all have can they return a "Guilty" verdict.*

250. In addition, the model of instructions only deals with certain offences and a particular set of facts and there will obviously cases involving other offences and other factual situations. It has already been noted that there is a need to develop guidance as to the discrete elements required to constitute the other offences for which jury trial is available.

251. However, in addition it is likely that jurors will also need guidance on issues such as:

- what constitutes self-defence and any other defences to an offence that might be recognised under the law, as well as what circumstances relevant to a particular accused would need to be taken into account in establishing them;
- how to determine the respective liability of several accused who may be involved in the commission of one or more offences but whose degree of culpability may differ, in particular as regards the specific conduct which can be ascribed to each of the accused for this purpose;

- how to deal with evidence that is circumstantial rather than direct and, in particular, what weight can be attached to it in the particular circumstances of the case;
- how to determine whether or not certain evidence can be regarded as corroborating other evidence and the importance of this where there might be concerns about the latter, such as the motive of the person giving it (e.g., personal animosity or the requirement to testify pursuant to a plea bargain[149]) or the fact that it was not possible for the witness concerned to be cross-examined by the defence;
- how to evaluate any evidence given by children and other vulnerable witnesses, given that they may have found some questions difficult to understand or to answer and that they may blame themselves for what occurred or be afraid or embarrassed to talk about certain matters relevant to the case;
- how to deal with inconsistencies between evidence given in court and statements made in the course of the investigation, indicating what considerations might make a change in position credible (such as allegations of ill-treatment or being in a stressful situation);
- how to consider whether the passage of time might have affected the reliability of the way in which witnesses may recall events about which they have testified, as well as how this might be a factor in the inability of the accused to remember particular details or to produce documents and other material evidence relevant to his or her defence;
- how to take account of an accused's confession which he or she has subsequently disputed as untrue or unreliable, albeit not for reasons that would have rendered it inadmissible;
- how to take account of an accused's good character (i.e., the absence of any previous convictions) and a witness's bad character (i.e., the existence of previous convictions), particularly as regards the credibility of any testimony he or she may have given;
- how to deal with expert evidence and, in particular, the factors to be considered in weighing such evidence (such as experience and standing), the need for caution for science and techniques still in their infancy or being called into question, the existence of factors that call into question an expert's impartiality and the points of dispute between two or more experts; and
- how to take account of the limits in being able to identify someone from the use of fingerprints and other impressions, voice, DNA, visual images, facial mapping and other such techniques.

252. *There is thus a need to address these issues in a reformulation and development of the Jury Instructions*.

[149] It should be noted that the *Jury Instructions* do not currently mention plea bargaining at all despite the specific duty to inform jurors about this in Article 237 of the Criminal Procedure Code of Georgia.

ANNEX 1[150]

JUROR QUESTIONNAIRE

You will be required to sit on this case up to the week ending Friday *[insert date]*. You will be required between *[insert time]* and *[insert time]* each weekday. Please take account of the time you will need to get to and from court when deciding whether you will have difficulty in sitting on this trial.

1. Please read and consider each question carefully.

2. Please answer every question. If you need to check information with family, friends, employers, etc., please do so before answering.

3. If the answer to any question is "Yes", please give details in the box provided.

4. Please hand your completed questionnaire to the usher.

5. WHEN ANSWERING PLEASE USE BLOCK CAPITALS.

JUROR NAME:

QUESTION	ANSWER *Please circle your answer*	
1. Do you know or recognise *[insert name]* who is the defendant in this case? Do you know any members of his family?	YES	NO
If you answered YES, please provide details.		
2. Do you or any members of your family or close friends know any of the following people associated with the case? *[insert list of names here]*	YES	NO
If you answered YES, please provide details.		
3. Have you or any members of your family or close friends ever worked for, had any business with or any other personal connection to *[insert organisation]* located at *[insert address]?*	YES	NO
If you answered YES, please provide details.		
4. Have you booked and paid for a holiday to be taken at any time between now and the estimated end of the trial?	YES	NO
If you answered YES, please provide dates and details. Please be ready to provide document(s) to support this. If you do not have documents with you, you will be asked to provide them when you next come to court.		
5. Do you have any medical condition which requires inpatient treatment or regular	YES	NO

[150] This is an example included in *The Crown Court Compendium Part 1: Jury and Trial Management and Summing Up*, which has been published by the Judicial College of England and Wales (https://www.judiciary.gov.uk/wp-content/uploads/2016/06/crown-court-compendium-pt1-jury-and-trial-management-and-summing-up-feb2017.pdf.

outpatient appointments or visits to your doctor?

If you answered YES, please provide details and dates (if known):

6. Are you caring for a young child or a sick or elderly relative **and** cannot arrange this to be covered by others during the time you are needed at court? YES NO

If you answered YES, please provide details:

7. Is there anything exceptional about your work, whether employed or self-employed, or in regard to any educational course being undertaken, such as examinations, which would make it impossible for you to sit on this jury? YES NO

If you answered YES, please provide details and dates (if known):

8. This case will involve reading a number of documents. They will be explained to you by the advocates and the judge. Do you have difficulty reading because English is not your first language, or for any other reason? YES NO

If you answered YES, please provide details:

9. Do you use English as a second language, and are you concerned for this or any other reason that you will be unable to keep up with the evidence? YES NO

If you answered YES, please provide details:

10. Do you have problems with reading or watching TV screens for any length of time? *[Also, where the evidence is presented in colour coded documents or diagrams]* Are you colour blind? YES NO

If you answered YES, please provide details:

11. Are you aware of any other factor that could prevent you from serving as a juror on this case, or is there any other information which you think the court would find helpful in deciding whether you could serve as a juror on this case? YES NO

If you answered YES, please provide full details:

ANNEX 2

Scottish Courts and Tribunal Service – Jury Service in the High Court and Sheriff Court

Information for Jurors

You are one of a group of people who have been called for possible jury service.
This booklet explains what this means, and what you can expect to happen.
It includes:
• Information on arrangements for coming to court
• What happens at the courthouse when you arrive
• What happens if you are chosen to serve on a jury in a criminal case
• How to make claims for loss of earnings or benefit, or necessary expenses incurred on jury service
• A glossary of terms to help you with words that may be used in court.
We would recommend that you read the sections 'Preparing for Jury Service' and 'At Court' before the date you are due to attend court.
Jury service is an interesting and important public duty. If, however, you have any difficulty with the extra travelling to and from court or with the rearrangement of domestic timetables, you can telephone the jury clerk, on the number provided in the local information leaflet, or talk to the clerk of court when you arrive at the courthouse. In these and similar situations the court officials try to be sympathetic, however you must understand that there may be circumstances where they may be unable to help or to excuse you.

If you wish to speak to a member of staff before your jury service begins, the telephone number is given on your juror's citation and in the local information leaflet.

YOU MUST BRING YOUR CITATION AND YOUR EXPENSES CLAIM FORM WITH YOU TO COURT.

If you want to apply for excusal or exemption from jury service you should read the enclosed **'Guide to Jury Service Eligibility and Applying for Excusal'** and fill in the **'Application for Exemption or Excusal from Jury Service'** form which is enclosed with your citation. Whilst all applications for excusal will be considered sympathetically, you must understand that court staff may not be able to excuse you from jury service. Rules of Court state that a jury cannot be balloted where there are less than 30 of those named on the list of jurors present in court, which means that it may not be possible for court staff to excuse jurors in all cases.
If you need to contact the court, please do so as soon as possible to avoid difficulty later. The telephone number and address of the court are given on the local information sheet included with this booklet. **When writing or calling, please state your juror citation number and date of attendance.**

If you have hearing difficulties or are disabled, please contact the court to see what arrangements can be made for you. Most courthouses have access for those with a mobility impairment.
Courtrooms generally are sound-enhanced and some have the Baker Sound Induction Loop (SIL) or Phonic Ear System fitted for the benefit of those with hearing difficulties. If you feel that, due to an illness or disability, you could not follow the evidence, then you should inform the clerk of court **before you attend the court** by completing the enclosed application for exemption or excusal from jury service.
You must also provide a medical certificate. Medical certificates which are requested from GPs for the purpose of jury service are exempt from payment. This is in terms of The National Health Service (General Medical Services Contracts) (Scotland) Regulations 2004. You should therefore tell the GP surgery of the purpose of the certificate and if you have any difficulty in getting the certificate free of charge you should refer the surgery to the above regulations.

Jurors' attendance update line
It is important that you telephone the jurors' attendance update line on the evening before first attending court, even if this falls on a weekend. The telephone number is shown on your citation. An unforeseen event may affect the start time of the court and last minute arrangements may have to be made for new jurors. So, to avoid unnecessary attendance or a lengthy wait for a delayed trial to start, **please telephone the jurors' attendance update line** to hear the recorded message.
After your first attendance at court you must follow the instructions about future attendance given by the judge or clerk of court.
Please note: if you need to speak to a member of court staff, you should not use this telephone number. Instead you should use the main court number on the local information sheet.
How to get to the courthouse
Details of how to get to the courthouse by train or bus, and a map showing the location of the courthouse are provided.
Car parking
If the courthouse has car parking facilities, details will be shown in the enclosed local information leaflet. If car parking facilities are not available, jurors must make their own arrangements. Please allow sufficient time to do so as it is vital that you reach the courtroom on time. You may be required to attend court for the whole day therefore it is advisable, if you need to bring your car to court, that you park in a long-stay car park. The court cannot allow you to leave a court case to go and put money in a parking meter. **Please note:** normally you will only be paid parking fees where public transport is unavailable or unsuitable for your personal needs.
What you should wear
Although there are no set rules as to what jurors should wear, your choice of clothing should be comfortable but smart, so as to reflect the importance of the role you are to play in court.

Smoking
Smoking is not permitted in the court building or precincts, the courtroom or the jury room. However, you may be allowed to smoke during refreshment breaks and if allowed court staff will escort you to areas outwith the building, where smoking is permitted.
Also, please note that jurors should not eat or chew gum while the court is sitting.

Mobile phones/music players
Mobile phones and music players must not be used and must be switched off when the court is sitting and when jurors are in the jury room considering their verdict. You may be allowed to use your mobile phone for personal calls during the lunch or refreshment breaks. However, you must remember that you must not discuss the case with anyone except your fellow jurors and then only in the privacy of the jury room.

The length of your jury service
Attendance as a juror is unlikely to last more than a week, but the exact length of any trial is hard to estimate. It depends on a number of factors, many of them outwith the court's control. For example, a trial involving a large number of witnesses will generally take longer than a trial with only a few. Cases which do take longer than a week are more likely to occur in the High Court, but can also on occasion happen in the sheriff court. In almost all cases jurors are able to return home each evening but in **exceptional** cases there may be good reasons why you cannot do this.
Most courts set down several trials to be heard during the week, so the number of jurors attending allows more than one jury to be chosen. During the talk to jurors the clerk of court may give an estimate of the length of the trial for which the ballot is about to take place. However, if a trial is expected to last several weeks, the court officials will try to warn jurors by enclosing a letter with the citation for jury service. If you have any pre-existing holiday commitments which make it difficult for you to serve as a juror in such a trial, please complete the 'Application for Exemption or Excusal from Jury Service' and enclose evidence of your holiday commitments, e.g. booking confirmation. You should be aware that there is the possibility that you may be balloted for more than one case during the period for which you have been cited. Whilst all applications for excusal will be considered

sympathetically, you must understand that court staff may not be able to excuse you from jury service. Rules of court state that a jury cannot be balloted where there are less than 30 of those named on the list of jurors present in court, which means that it may not be possible for court staff to excuse jurors in all cases.
Prospective jurors who are not chosen to sit on a jury will be sent away by the judge shortly after the ballot has taken place, but may be asked to return later in the week as further cases are to be tried. These jurors can get updated information by telephoning the jurors' attendance update line.
The court usually sits from around 10:00am until 4:00pm. Occasionally it may have to sit later. Lunch is provided for the jury and is taken between 1:00 and 2:00pm. Normally, you will not be permitted to leave the courthouse during the lunch break, but should you wish to make an urgent telephone call, then speak to the court official looking after the jury.

You must ensure that you arrive in good time for the start of court each day. It is advisable to go to the toilet before the court starts, as the next court break may be at lunchtime. Some courts may have a mid-morning comfort break, but if you need to visit the toilet during the day, you should attract the attention of a court official. The court will then take a short break.
If you are a first-time juror you may find the atmosphere on the first day tense, emotionally charged and possibly stressful, but you will soon settle in to the new environment and get used to procedures. Please listen carefully to all instructions given by the judge and court officials.

Security
Please look after your personal belongings carefully. Keep your handbag etc. with you at all times.
If you feel threatened at any time – by gesture, word or action – please inform any court official immediately.
In some courts, you may be asked by security officers to allow your bag to be searched and/or to walk through a metal detector. We would be grateful if you could cooperate with such requests as they are standard measures which are in place for the safety of court users.

What happens when you arrive?
On your arrival at the courthouse, a court official will note your attendance and you will be shown to the courtroom where the trial is to take place, or a waiting area.
Some time will be spent checking that all jurors are present.
The clerk of court will give a brief talk to the jurors about the arrangements which will apply if they are selected for jury service. During the talk, the clerk of court will tell you the name(s) of the accused and anyone else sufficiently important to have been named in the charge(s) and ask if you know any of these people. If you do, you should speak to the clerk of court. This would also be a good time to speak to the
clerk about any other matter which may cause you concern.
IF YOU DO NOT ATTEND COURT AS REQUIRED, AND HAVE NOT ALREADY BEEN EXCUSED, THE COURT MAY FINE YOU FOR FAILING TO COMPLY WITH YOUR CITATION.

Waiting for the court to start
It may be that an accused person will decide to change his or her plea from not guilty to guilty – possibly at the last minute. When this happens a jury will not be needed for this particular case. However, if more than one case has been set down for trial, you may be required to serve on the jury for another case, and it is normal practice to take the guilty pleas first. You may have to wait, until that case has been dealt with. There may be other occasions throughout the day where you are asked to wait outwith the courtroom. These are normally circumstances outwith the court's control and are often for legal reasons which cannot be discussed with the jury present, therefore you may only be given limited information. If the jurors are asked to leave court, then you may find it helpful to have something to read to help pass the time. We would ask you to be tolerant of these inconvenient, but necessary, delays.
There is often other court business programmed to take place before the case for which the jury is required. There may therefore be a delay before jurors are required and also before the clerk of court

can provide you with any information. Again we appreciate your patience during these unavoidable delays.

The selection of the jury

Once it is known that a trial is to start, the clerk of court will draw fifteen names at random from a glass bowl containing all the names of the jurors present. If your name is called out, you should come forward and take the seat you are directed to in the jury box.

Unless good reason is given, or an objection to the balloted juror is allowed, the first fifteen jurors balloted will make up the jury for the trial.

Please do not be worried if your name is objected to. If the judge decides you should not be part of the jury, you should return to your original seat in court.

Swearing the oath

After the jury has been selected, you will receive a copy of the indictment (the legal document which sets out the charges), together with a copy of any special defence lodged on behalf of an accused. Next, the clerk of court will read out the charge or charges against (each of) the accused. At this point the judge may ask the selected jurors before they take the oath whether any of them know any reason why they could not fairly serve as a juror in this case. If you think you know (any of) the accused, or have good reason why you should not serve, then you must tell the court immediately.

The clerk of court will then administer the oath to the jury. If you wish to affirm instead of swearing the oath, you can do so, but it would be helpful if you could mention this to the clerk of court in advance. Affirming means that you make a (non religious) promise before the court that you will well and truly try the case and reach a true verdict on the evidence presented.

After the jury has been sworn, the court will normally have a short break in order to allow the jury to make themselves comfortable. During the break, if you realise that you know someone named in the charge(s), you should tell the clerk of court so that the judge can be informed. **It is important not to discuss the matter with any of your fellow jurors.**

If you are not selected for the jury, you may be told that your jury service is finished.

But if there are other cases to be tried, the judge will tell you when to return to court or give you directions about using the jurors' attendance update line for information about your further attendance.

In Scotland all prosecutions are brought by the Crown acting through the Lord Advocate or one of their deputes, or the Procurator Fiscal.

The task of the Crown is to establish to the satisfaction of the jury the guilt of the accused. This is done by providing or leading evidence from witnesses.

The role of the judge

The judge (in the Sheriff Court, a sheriff) is in charge of all proceedings in the courtroom and he or she alone is responsible for advising you on all matters of law which affect the trial.

If a matter of law has to be decided, it will normally be done by the judge alone.

If a point of law is to be argued, the judge may direct the jury to leave the courtroom while this is taking place.

The role of the juror

Listen to all the evidence given and the instructions given by the judge. Do not make your mind up after hearing only *part* of the evidence, as you may be unable to give proper consideration to evidence which is yet to be heard. You can take notes if you wish – writing materials are provided for each juror. Once all the evidence has been given in the case, you should then listen to the speeches from the prosecutor and on behalf of the accused. Your task is to decide whether or not the charge(s) have been proven on the basis of the evidence that is presented to you in court. **You must not make any investigations or enquiries of your own,** only the evidence which has been presented to you in court is to be used in considering the verdict. If you become aware that any fellow juror has managed to get

a hold of information themselves then you must bring this to the attention of the clerk of court as soon as possible.
After that you will have to consider the judge's address and any direction in law given to the jury. Having been sent out by the court to consider the verdict, you may participate in discussions with fellow jury members in the jury room. You may wish to refer to notes you have taken during the trial. At the end of the jury discussions, cast your vote for the appropriate verdict.

Secrecy
The judge will say at the start that **you must not discuss the case with anyone except your fellow jurors and then only in the privacy of the jury room.**
No juror should have any contact with an accused person. It is a criminal offence for anyone to try to obtain information from a juror about any of the matters discussed by the jury, even long after the trial has ended.

The role of the jury
The role of the jury is to agree a verdict in the case, having heard and considered the facts according to the evidence given and the instructions given by the judge.

How the trial will proceed
Although some judges like to give a short explanatory talk, there are no preliminary or opening speeches on behalf of the prosecution or the accused. The trial begins with the appearance in the witness box of the first witness for the prosecutor.
As the prosecution bring the case to court, you hear their case first. **As there is no obligation to prove innocence, the accused person does not have to give or lead evidence on his or her behalf.** If the accused does lead evidence, witnesses on his or her behalf will go into the witness box.
Once all the evidence has been given, the prosecutor and counsel or solicitor for the accused, will make their speeches, talking directly to the jury about the evidence they have heard.

REMEMBER: DECIDE THE FACTS OF THE CASE ONLY ON THE BASIS OF THE EVIDENCE GIVEN, AND NOT ON THE BASIS OF ANYTHING ELSE.

Courtroom technology
In the courtroom you may see what appear to be TV screens on the desks and mounted on the walls. This equipment is occasionally used to help in the presentation of evidence to the court or to enable a witness to give evidence from another location outwith the courtroom.

Directions in law from the judge
After the closing speeches from the prosecution and defence, the judge will address the jury and tell them about the law that applies and what verdicts are open to them to return; give instructions on reaching a verdict; and request them to choose one of their number as the spokesperson.

Retiring to the jury room
Once the judge has completed his or her address to the jury, they go to the jury room to consider their verdict. Jurors may take into the room any notes they have made, together with any papers and any copy productions they have been given.
The first matter the jury may wish to decide is which juror will be in charge of their discussions and who will speak for them when they return to the courtroom and give in their verdict.

Procedural advice
If the jury require further advice or directions or for permission to see productions, they should advise the clerk of court who will take any request to the judge.
The court may sit again to hear that request.

Returning the verdict
When the jury are ready to return the verdict, they will return to the courtroom.

The clerk of court will then put questions to the jury spokesperson. Questions in a straightforward case are likely to be:

• Has the jury agreed upon a verdict?

Answer: *Yes/No*

• If yes, what is the verdict in respect of charge one against the accused?

Answer: *Guilty/Not Guilty/Not Proven*

• Is the verdict unanimous or by a majority?

Answer: *Unanimous/Majority*

In other cases the judge may tell the jury what alternative verdicts are open to them. The verdict must deal separately with each accused and each charge. The clerk of court will read back the verdict to the jury to confirm that it has been recorded accurately. **If any member of the jury disagrees with what the spokesperson of the jury is telling the clerk of court, they should say so immediately.**

When the verdict has been recorded by the clerk of court and agreed by the jury, the work of the jury is over. In the event of an acquittal verdict (not guilty or not proven), the accused is discharged by the court.

Finally, if the jury do return a guilty verdict, it is not always possible for the court to dispose of the case at that time. There may be a need for social enquiry or medical reports to be obtained, so the accused may need to return to court at a later date for sentence.

WARNING: IT IS AN OFFENCE TO PASS ON ANY INFORMATION ABOUT STATEMENTS MADE, OPINIONS GIVEN, ARGUMENTS PUT FORWARD OR VOTES CAST BY ANY MEMBER OF THE JURY DURING THEIR DISCUSSIONS, EVEN LONG AFTER THE TRIAL HAS ENDED. IF YOU DO SO, YOU MAY BE FINED OR SENT TO PRISON.

Accused: *person on trial charged with committing a crime or offence*
Adjournment: *any break in the hearing of the case*
Co-accused: *any other person charged along with an accused*
Indictment: *court document containing the charge(s)*
Joint minute: *document signed by both sides agreeing evidence*
Pan(n)el: *another name for the accused*
Perjury: *crime of deliberately telling lies in evidence in court*
Production: *an article or exhibit produced as evidence in court*
To affirm: *to make a solemn declaration without an oath or reference to religion*
Verdict: *the decision of the jury*

What you can claim

You are not paid for jury service, but you can claim:

• Loss of earnings or benefits

• Payment for someone else to do your job, e.g. if you are self-employed, however you can't claim for both loss of earnings and for someone else to do your job.

These sums will be repaid subject to a maximum daily amount

• Travelling expenses and any other expenses incurred in respect of jury service (e.g. child minding expenses/lunches).

Please ensure that you retain all receipts to support your expenses claim

There is a maximum amount which can be claimed. The rate is decided by Scottish Ministers, and is reviewed annually. The maximum amounts payable are included in your expenses guide. There is no scope for any juror to be paid more than these maximum amounts.

In order to claim expenses you should read the enclosed **'Guide to Applying for Expenses for Jury Service'** and fill in the jurors claim for travelling and financial loss form. Please note that where you are claiming loss of earnings your employer will need to fill in the **'Certificate of Loss of Earnings Form'**. The employer will also have to endorse the form with an authorised stamp. Where the employer does not have an official stamp, another piece of evidence will be required before payment can be made (for example headed notepaper or an invoice).

If you receive benefits, you should contact your local benefits office to tell them of the requirement for you to attend for jury service. If they tell you that they are going to withdraw your benefit during your period of jury service, you should contact the court to request a 'Certificate of Loss of Benefit' which you should ask the benefits office to complete. Without this certificate being completed and the required
evidence being produced, payment cannot be made.
If you are self-employed, you will need to provide evidence of your earnings, such as an Inland Revenue self-assessment tax return or certified accounts for the previous year to support your claim.
Accompanying this booklet is an expenses guide which will help you to fill in your claim form. If you have any questions about this, you should speak to a court official. If required, court staff, will help you fill in the claim form and make sure that you receive the correct expenses.

Thank you for your attendance
The judge, court officials and legal representatives all recognise and appreciate that serving as a juror may cause you some personal inconvenience. Despite this, we hope that you find the experience instructive and rewarding.
Without your essential contribution, it would not be possible for the Scottish legal system to maintain the high standards which have been achieved over the years.

What should I do if I am ill when I am due to attend court?
If you are ill on the date you are due to attend court you must contact the clerk of court on the telephone number on the local information leaflet **before 9:15 am**.
You must also provide a medical certificate. Medical certificates which are requested from GPs for the purpose of jury service are exempt from payment.
This is in terms of The National Health Service (General Medical Services Contracts) (Scotland) Regulations 2004. You should therefore tell the GP surgery of the purpose of the certificate and if you have any difficulty in getting the certificate free of charge you should refer the surgery to these regulations.

I earn more than the amounts payable for jury service, can I claim more?
Loss of earnings compensation for jurors is decided by the Scottish Ministers, and is reviewed annually. Payments are made as compensation for loss incurred during attendance, but may not fully cover individual juror's actual loss of earnings.
Payments are based on standard rates worked out by the time spent on jury duty.
The maximum amounts payable are included in your expenses guide. There is no scope for any juror to be paid more than these maximum amounts.

Is childcare available at the court?
There are no childcare facilities available at the court. You may, however, be able to claim childcare expenses. Please read the enclosed expenses guide for more details.

How can I find out if I am required for jury service tomorrow?
You should telephone the jurors' attendance update line as mentioned in your citation.

I am an employer, can I claim expenses as my employee has been selected for jury service?
No, only the employee can claim for loss of earnings. Please read the enclosed expenses guide for more details.

How do I apply for excusal/exemption?
You should read the **'Guide to Jury Service Eligibility and Applying for Excusal'** and fill in the application for exemption or excusal from jury service form and return it to the court which cited you. The court contact details can be found on your citation and in the cover of this booklet.

Who do I contact to find out if my application for excusal/exemption from jury service has been granted?

You should receive a letter from the court advising if this has been granted or not.
If you do not receive anything then you should contact the court which cited you. The contact details are provided on the **'Local Information Sheet'** included with this booklet. Please note that you should not use the jurors' attendance update line number for this purpose.

Some important points about jury service

• **Remember to phone the jurors' attendance update line the night before first attending court for jury service, even if this falls on a weekend.** There will be a recorded message containing important
information about attendance at court. The number can be found on the front of your citation form. This will avoid unnecessary attendance.
• If you need to speak to a member of court staff telephone the main court telephone number, or enquiries telephone number, on the local information leaflet. If you do not attend court as required, and have not already been excused, you may be fined for non attendance.
• You must make sure that you arrive in good time for the start of court each day.
• You must bring your citation and any expenses claim forms to court with you.
• Smoking is not permitted in the court building or precincts, the courtroom or the jury room.
• Mobile phones and music players must not be used and must be switched off when the court is sitting and when jurors are in the jury room considering their verdict.
• You must not discuss the case with anyone except your fellow jurors and then only in the privacy of the jury room. No juror should have any contact with an accused person.
• If you are ill on the date you are due to attend court you must contact the clerk of court on the telephone number on the local information leaflet **before 9:15 am**. You must also provide a medical certificate.